Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

HILLIARD L. LUBIN
and
AILEEN G. LUBIN
Petitioners

v.

EDINBURGH INSURANCE COMPANY, LTD.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

1. When a vessel insured under an all-risks yacht policy for barratry but not for seizure is barratrously used by its crew to smuggle drugs, in breach of a charter agreement, and, in the course of that barratry, the vessel is confiscated by a foreign government and becomes a total loss, is the proximate cause of that loss the barratry or the confiscation?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Hilliard L. Lubin and Aileen G. Lubin,[1] respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit dated December 8, 1981. The Court of Appeals affirmed the judgment of the United States District Court for the District of Maryland.

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[1] In the Court below, the appellants were Nautilus Virgin Charters, Inc., Hilliard L. Lubin and Aileen G. Lubin. The appellee was Edinburgh Insurance Company, Ltd.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals is unreported and is attached hereto as Appendix A. The opinion of the United States District Court for the District of Maryland is reported in 510 F. Supp. beginning at page 1092 and is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 8, 1981. No rehearing of this decision has been requested. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On November 15, 1978, Hilliard and Aileen Lubin purchased the TEHO, a Morgan forty-five foot auxiliary ketch from Nautilus Yacht Sales in Annapolis, Maryland. Shortly thereafter, the Lubins entered into a charter brokerage agreement with Nautilus Virgin Charters, Inc., which permitted Nautilus to arrange for charters of the TEHO out of St. Thomas, U.S. Virgin Islands. Nautilus was in the business of arranging charters for various yachts in addition to the TEHO. On August 30, 1978, Edinburgh Insurance Company, Ltd. of Tortola, British Virgin Islands, issued a policy of "all risks" insurance to Nautilus and to the individual owners of the yachts then under Nautilus' control. By certificate effective November 15, 1978, Edinburgh added the TEHO to this policy and named the Lubins as additional insureds.

The "all risks" policy issued by Edinburgh was on Edinburgh's own form rather than the standard form policy used by Lloyd's of London. It provided hull insurance and protection and indemnity insurance to the parties named therein, and it included coverage under the Longshoremen's Act, 33 U.S.C. §901, *et seq.* (1972). In particular, the yacht policy

included coverage for losses caused by the barratry of the master or crew but not for losses caused by capture or seizure.

In November, 1978, a person identifying himself as Harold P. McKay, Sr. telephoned Nautilus to inquire about chartering a yacht for the month of January, 1979 to sail among the Virgin Islands with his family. McKay, Sr. gave his address as Key West, Florida, and described himself as a truck operator about to retire. Nautilus had McKay, Sr. fill out a "sailing resume", in which McKay listed extensive past sailing experiences and credentials. Based upon the information provided in the "sailing resume", which Nautilus was able to verify in part, Nautilus and the Lubins entered into a Yacht Charter Agreement with McKay, Sr. for the bareboat charter of the TEHO for one month, commencing on or about January 1, 1979. The charter was to begin and end at St. Thomas, U.S. Virgin Islands. McKay, Sr. later requested that the navigation limits in the Charter Agreement be extended to cover navigation "as far South as the waters of Antigua." This request was granted by Nautilus and the Lubins, and Nautilus obtained extended coverage for this particular charter from Edinburgh, through its Annapolis, Maryland agent, Jack Martin & Associates, Inc.

On January 1, 1979, McKay, Sr. arrived at St. Thomas with a crew for the charter consisting of himself, his wife, his son, Harold P. McKay, Jr. (McKay, Jr.), his daughter-in-law, Kate McKay, and his young grandchild. The TEHO, with all the McKays aboard, departed from St. Thomas on or about January 4, 1979, never to be seen again by either Nautilus or the Lubins.

On February 2, 1979, McKay, Sr. called the Annapolis, Maryland office of Nautilus to inquire if there had been any word from his son. McKay, Sr. said that he had injured his foot in early January and that he, his wife and his grandson had disembarked in Puerto Rico on or about January 7, 1979 and returned to Florida. This, in itself, absent permission from Nautilus or the Lubins, was a breach of the charter agreement. McKay, Sr. further stated that his son and daughter-in-law had remained on the TEHO to sail to Antigua to visit friends.

Nautilus immediately filed an overdue vessel report with the United States Coast Guard. Several days later (February 4, 1979), Nautilus upgraded this report to a missing vessel report. On February 8, 1979, the Coast Guard notified Nautilus that a vessel answering the description of the TEHO was being held in Colombia, South America with its crew under arrest. Reports obtained from the American Consulate in Barranquilla, Colombia revealed that four Americans, McKay, Jr., Kate McKay, one Victor Rocco Paccioco and one Paul Danilo Pita, had been arrested by the Colombian Navy on January 17, 1979 for smuggling 150 bales of pressed marijuana. McKay, Jr. had in his possession at the time of his arrest a fraudulent United States passport.

Through sources at the United States Department of State, the Lubins learned that McKay, Jr. and the rest of the TEHO's crew had either escaped from or been released from Colombian custody. Subsequent efforts by the Lubins to locate the McKays have been unsuccessful. The Lubins were also advised by the State Department that they should not go to Colombia to attempt to recover the TEHO because, as the vessel's owners, they would be presumed to be guilty of any violation of Colombian law in which the TEHO had been engaged. A private investigator for the Lubins subsequently confirmed in September, 1980 that the TEHO would not be returned to the Lubins.

On February 6, 1979, Nautilus first reported the loss of the TEHO to Martin & Associates, which relayed this information to Edinburgh. Nautilus reported the loss to Edinburgh directly, by phone, on February 9, 1979 and filed a written claim with Edinburgh on February 12, 1979. Upon receipt of the first report of the TEHO's loss, Edinburgh initially denied coverage without making any investigation of the loss, despite the fact that Nautilus and the Lubins had a potentially valid claim of coverage for barratry. At the same time, Edinburgh's agent at Martin & Associates, Charles Hartge, gave some indication to Nautilus and the Lubins that Edinburgh would eventually take some action to assist them in recovering the yacht. Despite these assurances, when Edinburgh learned in late March, 1979

that the TEHO could be recovered by the payment of one-tenth of the value of the vessel to Colombian authorities, this information was *not* passed on to Nautilus or the Lubins. By the time Nautilus and the Lubins finally discovered what Edinburgh already knew, it was too late to redeem the TEHO.

Edinburgh did not officially deny the claim of Nautilus and the Lubins, in writing, until May 16, 1979, more than three months after the loss was first reported to it. Even then, this written notice of denial of claim was sent not to the Lubins and Nautilus, but to Martin & Associates. Charles Hartge of Martin & Associates testified at his deposition that he was not sure he had ever forwarded Edinburgh's formal denial letter to the Lubins or Nautilus.

Nautilus and the Lubins subsequently brought suit against Edinburgh in the United States District Court for the District of Maryland. The Complaint, as amended, consisted of two Counts, the first Count alleging that the loss of the TEHO was covered under Edinburgh's policy and the second Count alleging that Edinburgh had tortiously breached its duty of good faith toward its insureds by failing to pass on information concerning the recovery of the TEHO to them. Nautilus and the Lubins filed a Motion for Summary Judgment as to both Counts. Edinburgh filed a cross Motion for Summary Judgment as to Count I and a Motion to Dismiss Count II.

The District Court found, as a matter of fact, first, that the TEHO was indisputably lost, secondly, that a barratry of the TEHO did occur and, finally, that the policy covered losses occasioned by barratry. The sole issue facing the Court under Count I, therefore, was whether the loss of the TEHO was proximately caused by barratry or by the subsequent confiscation of the vessel by the Colombian Navy. The Court found that the loss of the TEHO was proximately caused by its confiscation by Colombian officials and not by the barratrous acts of McKay, Jr. In so holding, the District Court stated that it was bound by the rule of law established in an 1883 English case, *Cory v. Burr*, as allegedly adopted by the Fourth Circuit. Treating Edinburgh's Motion to Dismiss Count II as a Motion for Summary Judgment, the Court also granted judgment in

favor of Edinburgh on Count II, despite the existence of genuinely disputed material facts.

Nautilus and the Lubins filed an Appeal to the United States Court of Appeals for the Fourth Circuit, contending that the District Court had erred in failing to identify and apply the correct rule of proximate causation and had also erred in granting summary judgment as to Count II on a record replete with material factual disputes. A panel of the Fourth Circuit affirmed the District Court's judgment, without any substantive discussion of the issues, and adopted the District Court's reasoning.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Herein Conflicts With Decisions of This Court

It is a rule long established by this Court that when two causes of loss concur, the proximate cause of loss is not necessarily that cause immediately preceeding the loss in time, but rather is that dominant or efficient cause of the loss which sets the other causes in operation. *Standard Oil Co. of New Jersey v. United States*, 340 U.S. 54, 57-58 (1950) (hereinafter, *"Standard Oil II"); Lanasa Fruit Steamship & Importing Co. v. Universal Insurance Co.*, 302 U.S. 556, 562-63 (1937); *The G.R. Booth*, 171 U.S. 450, 457-58 (1898). This rule of law has historically been applied by the Court not only in cases of marine insurance law, but in cases involving insurance law generally. *Compare Waters v. The Merchants Louisville Insurance Co.*, 36 U.S. (11 Pet.) 213 (1837) *with Aetna Insurance Co. v. Boon*, 95 U.S. 117 (1877).

In applying the proximate cause rule to cases involving two concurrent causes of loss, this Court has consistently held the earlier of the two causes to be the proximate cause of a loss where it was found that the earlier cause was the "superior or controlling agency", *The G.R. Booth*, 171 U.S. at 460-61, and that the later cause "occurred while the [first cause] was in progress" or was an event "so linked together [with the first

cause] as to form one continuous whole." *Boon*, 95 U.S. at 457; *The G.R. Booth*, 171 U.S. at 460-61.

In *The G.R. Booth* case, this Court faced the question of whether sea water damage to a cargo of sugar stowed in one hold of the vessel was proximately caused by an explosion of blasting caps in another hold or by the inflow of waters from a large hole in the side of the vessel created by the explosion. The bill of lading covering the sugar contained a clause exempting the carrier from liability for any cargo damage caused by "perils of the sea or other waters." After finding that the explosion and the subsequent inflow of water were two concurrent causes of the damage to the sugar, this Court held that the explosion, as the cause which set the water in motion and gave it its efficiency for harm at the time of the disaster, must be regarded as the proximate cause of the damage. 171 U.S. at 460-61.

Similarly, in *Aetna Insurance Co. v. Boon*, this Court was asked to decide whether the insured could recover under a policy of fire insurance for goods destroyed when a Union officer set fire to a series of buildings in Glasgow, Missouri during the Civil War, in order to prevent the goods from falling into the hands of Confederate soldiers then attacking the town. The fire insurance policy in question expressly provided that the insurers would not be liable for any loss or damage by fire which took place by means of "any invasion, insurrection, riot or civil commotion, or of any military or usurped power." 95 U.S. at 127. Holding that the Confederate attack rather than the fire proximately caused the loss of the goods and that the loss was therefore not covered, this Court stated:

> "The conclusion is inevitable that the fire which caused the destruction of the plaintiff's property happened . . . not merely in consequence of, the rebel invasion . . . The fire occurred while the attack was in progress and when it was about being successful. The attack, as a cause, never ceased to operate until the loss was complete. * * * * [The fire] was one of a continuous chain of events brought into being by [the rebel attack] — events so linked together as to form one continuous whole."

Id. at 132-33.

A key application of the proximate cause rule by this Court in a concurrent cause of loss situation was in *Standard Oil Co. of New Jersey v. United States*, 267 U.S. 76 (1925) (hereinafter, "*Standard Oil I*"). *Standard Oil I* involved a suit under a policy of insurance insuring the steamship LLAMA against war risks. This war risk policy covered takings at sea but not marine perils. On October 14, 1915, while enroute from New York to Copenhagen, the LLAMA was stopped by the British warship VIRGINIA and ordered by an armed contingent of British officers to proceed directly to the town of Kirkwall by way of a certain course. A few hours after proceeding on the ordered course, the LLAMA struck a rock, stranded and was totally lost.

The issue before this Court in *Standard Oil I* was whether the proximate cause of the vessel's loss was the initial taking at sea by the British warship, a covered peril, or the subsequent stranding, a marine peril not covered by the policy. Holding that the loss was proximately caused by the taking at sea and thus within the coverage of the policy, this Court ruled:

> "[I]f a vessel should be taken from an owner's hands without his consent and should be lost while thus held by a paramount power, obviously a company that had insured against such a taking could not look beyond and attribute the loss to a peril of the sea. *Whatever happens while the taking insured against continues fairly may be attributed to the taking.* * * * As the vessel had passed out of the owner's control before the accident by a seizure within the policy and as the loss happened while the vessel thus was held by an adverse hand, it follows that the libelant must prevail."

267 U.S. at 77-78, 79 (emphasis added). Although this Court did not expressly so state, it is clear that the *Standard Oil I* Court regarded the taking at sea and the stranding as concurrent causes of loss. In determining which of the two events proximately caused the loss of the LLAMA, this Court found that the taking at sea was the controlling event and that the stranding was an event which merely occurred while the taking was in progress.

The rule of proximate cause was most recently applied by this Court in a marine insurance case involving two concurrent causes of loss in *Lanasa Fruit Steamship & Importing Co. v. Universal Insurance Co.*, 302 U.S. 556 (1938). The *Lanasa* case involved a suit on a policy of marine insurance to recover for the loss of a cargo of bananas which rotted after the vessel carrying them stranded in the Chesapeake Bay. The policy insuring the bananas covered losses due to marine perils such as stranding, but did not cover losses due to inherent vice of the cargo. In this Court's own words, "The sole question [was] whether in these circumstances the stranding should be regarded as the proximate cause of the loss." 302 U.S. at 562. In determining whether the loss of the bananas was proximately caused by stranding or inherent vice, this Court correctly stated the rule that "the proximate cause is the efficient cause and not merely an incidental cause whch may be nearer in time to the result," citing *Aetna Insurance Co. v. Boon. Id.*

After discussing authorities on both sides of the Atlantic, this Court rejected the so-called English rule of proximate cause in marine insurance cases that only the last cause in time can be regarded and held that the loss of the bananas was proximately caused by the stranding. *Id.* at 565, 567-68. In so holding, this Court was influenced by the decision of Justice Story in *Magoun v. New England Marine Insurance Co.*, 16 F. Cas. 483 (C.C.D. Mass. 1840) (No. 8,961), in which Justice Story stated that the correct exposition of the proximate cause rule was that all consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself. *Lanasa*, 302 U.S. at 564-65.

There can be no doubt that the circumstances surrounding the loss of the TEHO in this case presented the Court of Appeals with a situation involving two concurrent causes of loss. The barratry of McKay, Jr. was concurrent in time with the confiscation of the TEHO by Colombian authorities. The confiscation occurred while the barratry was in progress, and the barratry never ceased to operate until the loss was complete. Applying the rule of proximate cause where two causes of loss concur to this case, barratry clearly was the dominant or

efficient cause of the TEHO's loss. The seizure of the TEHO for drug smuggling naturally flowed from McKay Jr.'s barratrous use of the vessel to smuggle drugs, and was a forseeable consequence thereof. On these facts, the seizure would not have occurred but for the barratry.

This case is distinguishable from the hypothetical situation in which the TEHO, while barratrously engaged in smuggling drugs off the Colombian coast, is seized by the Colombian Navy because Colombia is at war with the United States and is routinely seizing all U.S. flag vessels in its waters. It is also distinguishable from hypothetical situations in which the vessel is seized, not because of drug smuggling activities, but because the vessel has violated a Colombian safety or pollution control law. In all of these hypothetical situations, unlike the events which actually transpired, the seizure of the vessel had nothing to do with the barratrous smuggling activities of the crew, but was an independent cause of loss.

Despite the fact that this case presents a situation involving two concurrent causes of loss and despite this Court's historical application of the proximate cause rule in such situations, the Court of Appeals, in adopting the District Court's rationale, held that the seizure of the TEHO, rather than the barratry, was the proximate cause of the loss. The District Court's Opinion indicates that the District Court never even considered the question of whether or not concurrent causes operated to cause the loss of the TEHO, and thus the court could not have correctly applied the proximate cause rule set down by this Court.

Although the District Court Opinion does mechanically cite this Court's definition of "proximate cause" from *Standard Oil II* as "that cause which is most nearly and essentially connected with the loss as its efficient cause", the District Court, and therefore Court of Appeals, completely ignored this Court's application of that rule in concurrent loss situations. Indeed, other than *Standard Oil II,* no other U.S. Supreme Court case was cited by the District Court as support for its holding. Instead, the District Court based its holding almost exclusively on the application of the proximate cause rule by the British

House of Lords in 1883 in the case of *Cory v. Burr*, 8 App. Cas. 393 (1883).

Although the highest British and American Courts have both adopted the maxim "*Proxima causa non remota spectatur*" ("the proximate and not the remote cause is considered"), there is a difference of 180 degrees in the way the British and American Courts have interpreted and applied that maxim in cases involving concurrent causes of loss. The British Courts interpret the maxim very narrowly to mean that the occurrence last in time or nearest to the loss is the proximate cause of that loss. *Cory v. Burr*, 8 App. Cas. 393 (1883); *Pink v. Fleming*, L.R. 25 Q.B.D. 396 (1890). This Court, on the other hand, has historically interpreted the maxim broadly to mean that the dominating or controlling cause of a loss is the proximate cause of that loss. *Standard Oil II*, 340 U.S. at 57-58, *Lanasa*, 302 U.S. at 562-63, *The G.R. Booth* 171 U.S. at 457-58. This Court has further held that if the dominating cause of loss is covered by the policy, then policy coverage encompasses all of the consequences which flow naturally from the dominant occurrence. *Lanasa*, 302 U.S. at 565.

The difference between the American and English interpretations of the proximate cause rule is recognized on both sides of the Atlantic. In the *Lanasa* case, this Court specifically noted that the weight of American authority was contrary to the English doctrine of *Pink v. Fleming* that only the cause last in time can be looked to in determining the proximate cause of a loss. *Lanasa*, 302 U.S. at 567-68. Likewise, in *Pink v. Fleming*, L.R. 25 Q.B.D. 396 (1890), Lord Esher observed on the question of proximate causation:

> "With regard to the American authorities, the American law on the subject seems to differ materially from our [English] law, and therefore it is not necessary to consider them."

L.R. 25 Q.B.D. at 398.

The English rule of proximate cause in *Pink v. Fleming* is the same as that employed by the House of Lords in *Cory v. Burr*. In *Cory*, the House of Lords held that where an English vessel was seized by Spanish revenue officers while the master

was barratrously engaged in smuggling tobacco, the vessel's loss was proximately caused by seizure and not by barratry. In so holding, Lord Blackburn rejected the American cases cited to the House of Lords because he found that they were based on an entirely different theory of proximate cause. 8 App. Cas. at 401. The American theory of proximate cause, Lord Blackburn noted, was akin to that of an earlier English case, *Havelock v. Hancill,* 3 T.R. 277 (1789).

In the *Havelock* case, the underwriter had insured against "the barratry of the master and mariners, and against all other perils, losses and misfortunes, that had or should come, to the hurt, detriment or damage of the said ship." 3 T.R. at 277. The master "in a barratrous and fraudulent manner" had imported a "quantity of foreign brandy and other spiritous liquors," which caused the ship to be subsequently seized by customs officers. *Id.* In a suit on the policy, the underwriter was held liable by the *Havelock* court because the master's barratrous actions had subjected the ship to seizure. *Id.* at 278. The seizure was not viewed by the court as an independent and supervening cause of loss.

Given the divergence by the Court of Appeals from the long line of cases in this Court applying the American proximate cause rule to concurrent loss situations, and given the Court of Appeals' reliance on an English proximate cause rule which this Court explicitly refused to follow in *Lanasa,* the Court of Appeals' decision should be reviewed by this Court to bring it into conformity with prior decisions of this Court.

II. The Court of Appeals Has Rendered a Decision in Direct Conflict Not Only With Decisions of the First and Second Circuits on the Same Subject, But With Decisions of its Own Circuit As Well

By applying the English proximate cause rule to a loss caused by two concurrent events, the Court of Appeals has taken a position in direct conflict with decisions by the First and Second Circuits on the same subject. Moreover, the Court of Appeals' decision conflicts with the prevailing rule of law in its own Circuit, the Fourth Circuit, as well.

A. The Court of Appeals' Decision Conflicts With Decisions By the First and Second Circuits

Two cases on this subject have been decided by the First Circuit, *Magoun v. New England Marine Ins. Co.*, 16 F. Cas. 483 (C.C.D. Mass. 1840) (No. 8,961) and *Dole v. New England Mutual Marine Ins. Co.*, 7 F. Cas. 837 (C.C.D. Mass. 1864). In *Magoun*, the issue was whether deterioration of cargo and corresponding damage to a vessel was proximately caused by (1) the confiscation and detainment of the vessel by local authorities for engaging in illicit trade or (2) the subsequent long exposure of the vessel to a hot climate while in custody. Justice Story found that the correct exposition of the proximate cause rule was that:

> "All the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself."

16 F. Cas. at 486. In applying that rule, Justice Story held that the earlier occurrence, the confiscation and detainment, was the proximate cause of the loss, since the vessel was never delivered from the peril of confiscation at any time before being exposed to the hot climate. *Id.* In other words, the confiscation and hot climate were concurrent causes of loss, and the confiscation was the controlling event without which no exposure to the elements would have occurred.

In *Dole*, the proximate cause rule was given an even more liberal interpretation by the court. The marine policy in the *Dole* case covered the vessel GOLDEN ROCKET for losses due to fire, but not for losses due to seizure. At the beginning of the Civil War, the GOLDEN ROCKET was confiscated and plundered by a Union vigilante group, which subsequently set fire to the vessel. The issue facing the court was whether the loss had been proximately caused by the confiscation or by the subsequent fire. Citing the *Magoun* case with approval, Justice Clifford stated the proximate cause rule as follows:

> "The rule is, that where different causes concur, to one of which it is necessary to attribute the loss, it is

> to be attributed to the efficient predominating peril, whether or not it is or not in activity at the consumation of the disaster [citation omitted]."

7 Fed. Cas. at 852. Holding that the loss of the vessel was proximately caused by the confiscation rather than by the fire, Justice Clifford went on to say:

> "Such losses are held by all writers as fairly attributable to the original taking. [Citations omitted]. Where the master, in violation of his duty, wilfully undertook to run a blockade, or to engage in illicit trade, and was captured, barratry, and not capture was held to be the cause of the loss . . ."

Id. at 853 (citing, among other cases, *Havelock v. Hancill, supra.*) If the present case had come before the First Circuit, clearly barratry and not seizure would have been held to have been the proximate cause of the TEHO's loss under the rationale of the *Magoun* and *Dole* cases.

There are four cases on this subject which have been decided by the Second Circuit, *Muller v. Globe & Rutgers Fire Ins. Co.*, 246 F. 795 (2d Cir. 1917), *Hagemeyer Trading Co. v. St. Paul Fire & Marine Ins. Co.*, 266 F. 14 (2d Cir. 1920), *Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2d Cir. 1974) and *Blaine Richards & Co. v. Marine Indem. Ins. Co.*, 635 F.2d 1051 (2d Cir. 1980).

The *Muller* case involved essentially the same facts as those before this Court in *Standard Oil I.* In *Muller*, the vessel CANADIA was insured under a war risk policy which covered losses by seizure, but not those caused by marine perils. While the CANADIA was enroute to Sweden during the early days of World War I, it was stopped and boarded by an armed party from a British cruiser. The master of the CANADIA was instructed to proceed to Kirkwall, Scotland, at night, by a certain course. All aids to navigation on land having been extinguished, the master was forced to rely on the local knowledge of the British naval officer in charge. Consequently, the vessel ran aground and wrecked. The court addressed the

question of whether the loss had been proximately caused by the seizure or by the stranding (a marine peril) and correctly stated the proximate cause rule to be applied in a case involving two concurrent causes of loss:

> "That cause is proximate which sets the other causes in motion; only when causes are independent is the nearest in time looked to. *Insurance Co. v. Boon*, 95 U.S. 117, 24 L.Ed. 395, a case whose facts are instructive and interesting. If there is an unbroken connection between act and injury, the act causes the injury; an intervening act is not the proximate cause of injury, unless it is efficient to break the causal connection."

246 F. at 762-63.

The court found that since the CANADIA had not chosen her own route to Cornwall but had been compelled to pursue an imposed route, the seizure by British authorities, in effect, "created the peril of unlighted seas." *Id.* at 763. Thus, the seizure rather than the subsequent stranding was held to have been the proximate cause of the vessel's loss. *Id.*

The *Hagemeyer* case presented the Second Circuit with the question of whether the loss of a German ship, while in the custody of the British navy during World War I, was proximately caused by fire, or by the subsequent scuttling of the vessel by the British in order to prevent the fire from attracting enemy attention. The marine policy insuring the vessel included coverage for losses by fire, while expressly excluding losses due to the consequences of detention or warlike operations. Citing the *Muller* case with approval, Judge Manton stated the rule to be applied as follows:

> "If a cause is approximate in its efficiency, it can be said to be truly proximate. If the efficiency can be said to have been preserved, although other causes may have sprung up, which have not destroyed or impaired the same efficient cause, a result may follow in which that cause still remains the real efficient cause, and to which the event can be ascribed."

266 F. at 17. Applying this rule, Judge Manton held that the fire was the proximate cause of the loss. *Id.*

The precedent set by this Court in *Standard Oil I* was followed by the Second Circuit in the *Pan Am* case. Although *Pan Am* involves a question of proximate causation under aviation insurance law, the facts in that case are particularly apt and applicable to marine insurance cases as well. In *Pan Am,* a 747 jet was hijacked by two political terrorists over London and diverted from its intended destination to Cairo. At Cairo, the plane's passengers were released and the plane was blown up by explosives. The "all risks" policy covering the plane insured it against "all physical loss or damage." Losses resulting from seizure by a military or usurped power, war, rebellion, warlike operations or civil commotion, however, were excluded from coverage. The underwriters argued that the loss had been proximately caused by one of the excluded events, while the airline asserted that the loss was attributable to the hijacking, and therefore covered by the "all risks" policy.

After an extensive examination of various marine insurance authorities, the *Pan Am* court held that the physical destruction of the airplane must be fairly attributed to the hijacking. Relying upon the rule adopted by this Court in *Standard Oil I,* that whatever happens while the taking insured against continues fairly may be attributed to the taking, the Second Circuit concluded:

> "[A]ll of the parties recognize that when a peril [i.e., barratry] results in the owner's losing control over insured property, any subsequent damage to or loss of the property is attributable to the peril causing the loss of control. In other words, the proximate cause of a loss resulting from a taking [i.e., barratry] followed by destruction is determined by the nature of the taking. While the events immediately preceding the taking may proximately cause a loss, the events following a taking may not. The insurance authorities uniformly support this rule . . ."

Pan Am, 505 F.2d at 1008 (citing, among other cases, *Standard Oil I, Magoun* and *Dole, supra.*).

The soundness and logic of the Second Circuit's ruling in *Pan Am,* as well as that of this Court in *Standard Oil I,* is demonstrated by the following passage from *Pan Am:*

> "If events following a hijacking [read "barratrous taking"] were permitted to control the insurance nature of the loss, the outcome in any case would vary according to the whim of the hijacker [read "barratrous crew"].* * * * The parties cannot have intended that the caprice of the hijackers [read "barratrous crew"] would control the insurance consequences of the loss."

Id. The logic used by the *Pan Am* court to reach its holding is especially pertinent in a situation involving the barratrous taking of a vessel for a criminal purpose. Such an act of barratry, in and of itself, is rarely, if ever, the exclusive cause of any loss. If a barratrous crew takes over a vessel, uses it for illicit purposes, and then returns that vessel to its owner, the insured has not suffered any loss. For a loss to occur due to barratry, there must necessarily be some other event following the barratry such as a delay, a sinking, a stranding, or a seizure. To rule, as the Court of Appeals did in this case, that a barratry followed by a seizure is not covered by an "all risks" policy is to permit fortuitous subsequent events to control the insurance consequences of the loss. In order for a marine policy purporting to cover losses due to barratry to have any meaning, such coverage must extend to *all* of the foreseeable and natural consequences of barratry as well.

The fourth decision of the Second Circuit on this subject is that of *Blaine Richards & Co. v. Marine Indem. Ins. Co.,* 635 F.2d 1051 (2d Cir. 1980). In *Blaine Richards,* the plaintiff's cargo of pea beans was covered by an "all risks" policy which insured the beans against "all risks of physical loss" but did not insure against losses due to confiscation or delay. The beans were fumigated prior to ocean shipment by the fumigant "Phostoxin", a pesticide not approved by the FDA. When the

beans arrived in Baltimore, they were inspected and detained by the FDA because of the presence of the pesticide. As a result, the plaintiff incurred substantial expenses in cleaning and rebagging the beans, for which he sought to recover. The court was faced with the question of whether the detention by the FDA or the improper fumigation of the beans proximately caused the loss. After citing the *Pan Am, Lanasa* and *Standard Oil II* cases, the court stated that it "must attempt to ascertain what the Supreme Court has referred to as the 'predominant and determining' or 'real efficient' cause of the loss," and held that the detention was the proximate cause of the loss. *Blaine Richards,* 635 F.2d at 1054-1055.

Although the Second Circuit stated the correct proximate cause rule in *Blaine Richards,* it obviously applied that rule in a situation involving successive rather than concurrent causes of loss. The improper fumigation of the beans and their subsequent detention were not concurrent causes of loss because the fumigation had completely terminated before the beans were detained by the FDA. The *Blaine Richards* case is distinguishable from the present case, therefore, in which the barratry of McKay, Jr. never ceased to operate before the TEHO was seized by the Colombian Navy. The distinguishable factual situation in *Blaine Richards* no doubt explains a result in that case which is entirely inconsistent with the result reached in the *Pan Am, Lanasa* and *Standard Oil II* cases, upon which the *Blaine Richards'* court purportedly relied. If *Blaine Richards* cannot be distinguished on this basis, then there is a conflict of law in the Second Circuit on this subject.

B. The Court of Appeals' Decision is in Conflict With Decisions By the Fourth Circuit on the Same Subject

The decision of the Court of Appeals in the present case is in conflict with two decisions from its own Circuit, *Goodman v. Fireman's Fund Ins. Co.,* 600 F.2d 1040 (4th Cir. 1979) and *National Union Fire Ins. Co. v. Republic of China,* 254 F.2d 177 (4th Cir. 1958). In the *Goodman* case, the owner of a yacht sued to enforce an "all risks" marine insurance policy which insured the vessel against "all risks of physical loss or damage,"

including losses due to the owner's negligence, but not against "loss or damage through . . . ice and/or freezing." 600 F.2d at 1041. The yacht owner sought to recover for the sinking of his vessel caused by the freezing of seawater in the vessel's cooling system. The evidence revealed that the yacht owner had been negligent in failing to winterize the vessel by closing its port and starboard sea valves. The open sea valves permitted water to enter the vessel's cooling system, where it subsequently froze.

The issue before the Fourth Circuit in *Goodman* was whether the loss of the vessel had been proximately caused by the owner's negligence (a covered risk) or by ice and freezing (a risk specifically excluded from coverage). The District Court had held that the freezing of the water in the cooling system proximately caused the sinking and, on that basis, found the loss excluded from coverage. The Fourth Circuit disagreed. Stating the correct rule of proximate causation where two causes of loss concur, the Fourth Circuit observed:

> "When two or more causes combine to cause a loss, one of which is insured against while the other is not, the loss is not insured unless the covered cause is the predominant efficient cause of the loss. *See e.g., Phenix Insurance Co. v. Charleston Bridge Co.*, 65 F. 628, 632 (4th Cir. 1895). We think plaintiff's negligence was the predominant efficient cause of the sinking. While freezing was an intervening cause of the series of events, it was *not unforeseeable.*"

600 F.2d at 1042 (emphasis added). Although the Fourth Circuit ultimately held in *Goodman* that the vessel owner could not recover on the policy because he had breached an express warranty to lay-up the vessel from October 1 to May 1, the court made it clear that but for this breach of warranty, "we would find coverage under the all risks provision if it were considered alone." *Id.*

Although the *Goodman* case was cited to the Court of Appeals herein, there was no discussion of *Goodman* in the Court of Appeals' Opinion. Yet, under the rationale of *Goodman*, Nautilus and the Lubins should have recovered. The

barratry and seizure of the TEHO clearly presented the Court of Appeals with a situation involving two concurrent causes of loss. Moreover, the marine insurance policy in the present case was identical with the one in *Goodman*, in that (1) both policies were "all risk" policies and (2) in that the earlier cause of loss was covered under both policies (barratry/owner's negligence) while the later cause of loss was excluded under both policies (seizure/freezing). Like the freezing of the cooling system in *Goodman*, the seizure of the TEHO by Colombian authorities was not unforeseeable. *See Goodman*, 600 F.2d at 1042. In fact, one of the leading authorities on insurance defines barratry as "an act which subjects a vessel to seizure." 11 COUCH ON INSURANCE 2d §43:48 (1963).

Republic of China is the second Fourth Circuit case in conflict with the decision of the Court of Appeals in the present case. The District Court herein referred extensively to *Republic of China* as support for its theory that the English version of the proximate cause rule, as applied in *Cory v. Burr*, is the law in the Fourth Circuit. However, the District Court's reliance was misplaced. In *Republic of China*, the Fourth Circuit was faced with the issue of whether the defection of the masters and crews of seven vessels owned by the Chinese Nationalist government, by turning the vessels over to the Chinese Communist regime, constituted "barratry", a loss covered by the policy, or "seizure", a loss excluded by the policy. The Fourth Circuit held that the taking of the vessels by their masters and crews was not a seizure, but a barratry. 254 F.2d at 185.

Since the Fourth Circuit found only one cause of loss in *Republic of China*, barratry, the issue of which of two concurring events proximately caused the loss did not arise in that case. Judge Soper, speaking for the Fourth Circuit, recognized that fact and therefore explicitly distinguished *Cory v. Burr:*

> "It was held [in *Cory v. Burr*] that the loss was caused not by the barratry of the master but by the seizure of the ship by the Spanish Government. This holding distinguishes the decision from the instant case where it has been found that the barratrous acts constituted the *ultimate and efficient* cause of the loss of the Hong Kong ships . . ."

Id. at 186 (emphasis added). Since this was the only mention of *Cory v. Burr* by the Fourth Circuit in *Republic of China,* it is difficult to justify the District Court's conclusion in the present case that "Judge Soper approved the rule of proximate causation as set forth in . . . *Cory v. Burr.*" (Appendix B at 10b). This is especially true since that part of the District Court's opinion in *Republic of China* which cited *Cory v. Burr* approvingly was expressly reversed by the Fourth Circuit on appeal.

Given the fact that the Court of Appeals in the present case ignored the precedent set forth in *Goodman* and, through its approval of the District Court's rationale, incorrectly relied on *Republic of China,* this Court should review the decision of the Court of Appeals to bring it in line not only with *Goodman,* but with the decisions of the First and Second Circuits as well.

III. The Court of Appeals Has Decided An Important Question of Federal Law In An Area Which Has Not Been, But Should Be, Clarified By This Court

This Court has long recognized its power and responsibility to fashion the controlling rules of maritime law and has exercised that power where necessary to do so. *Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 20-21 (1963); *see Mitchell v. Trawler Racer, Inc.,* 362 U.S. 539 (1960); *The Tungus v. Skovgaard,* 358 U.S. 354 (1959); *Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959); *Wilburn Boat Co. v. Fireman's Fund Insurance Co.,* 348 U.S. 310 (1955); *Warren v. United States,* 340 U.S. 523 (1951); *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.,* 339 U.S. 684 (1950); *The John G. Stevens,* 170 U.S. 113 (1898). The necessity of this Court's intervention in this case is great indeed.

To allow the decision of the Court of Appeals herein to stand would not only be manifestly unfair to the Lubins, but to the many other vessel owners whose yachts have been barratrously taken, used to smuggle contraband and been confiscated for that reason by U.S. or foreign governments. The television series "Sixty Minutes", in interviews with Coast Guard Commander Lawrence Kindbom and Rep. John Murphy [D. — New York] during its broadcast of August 6, 1978, in a segment entitled "Pirate's Lady", reported that between 1973

and 1978, perhaps hundreds of yachts were hijacked at sea, never to be seen again. (See transcript of "Sixty Minutes" broadcast, Appendix C, at pp. 6c-7c). It is highly likely that the reason for the disappearance of at least some of these yachts is that they have been confiscated and retained by a foreign government. Even in the short period of time since the Court of Appeals decision herein, the Petitioners have learned of sixteen other instances in which a vessel was barratrously taken, used to smuggle contraband and subsequently confiscated. (See Appendix D).

If this Court permits the decision of the Court of Appeals to go unchallenged, those purchasing yachts or fishing vessels this year and chartering them out obviously will be on notice to procure some kind of special theft or barratry insurance. However, for those who have already lost their vessels in a manner similar to that of the TEHO and believed that their "all risks" insurance policy covered such losses, there will be no remedy. Thus, the decision of the Court of Appeals creates an uncertainty for those underwriters and insureds who operate in the already unsettled waters of the Caribbean and Central America. (See Appendix C at p. 9c).

Within the last decade, "barratry" has become more than an offense associated with the bygone days of the clipper ship. It has become a twentieth century problem in this country which cries out for a twentieth century solution. Only this Court, as the final arbiter of maritime law in the United States, can provide such a solution. Only this Court can clarify the uncertainty and confusion in this area created by the Court of Appeals' decision herein. The Court of Appeals' decision conflicts not only with other decisions on the same issue in the Fourth Circuit, but with decisions of the First and Second Circuits. More importantly, the Court of Appeals' decision relies on an interpretation and application of a nineteenth century English rule of proximate cause, the rule of *Cory v. Burr,* which this Court explicitly refused to follow in the *Lanasa* case. This important question of Federal Law should be settled by this Court, through a review of the Court of Appeals' decision herein.

IV. CONCLUSION

The decision of the Court of Appeals herein creates an injustice to the Lubins and to all others similarly situated by applying a nineteenth century English rule of proximate cause to achieve a result contrary to the decisions of the Courts of Appeal which have considered the issue and contrary to the previous holdings of this Court. A Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit herein.

Respectfully submitted,

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Attorneys for Petitioners
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Aileen G. Lubin

March 5, 1981

Appendix

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1408

NAUTILUS VIRGIN CHARTERS, INC.
AND HILLIARD L. LUBIN AND AILEEN G. LUBIN,
Appellants,

v.

EDINBURGH INSURANCE COMPANY, LTD.,
Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

Argued November 4, 1981 Decided December 8, 1981

Before WINTER, Chief Judge, PHILLIPS and ERVIN, Circuit Judges.

Francis J. Gorman (JoAnne Zawitoski, Semmes, Bowen & Semmes on brief) for Appellants; Manfred W. Leckszas, Geoffrey S. Tobias (Ober, Grimes & Shriver on brief) for Appellee.

PER CURIAM:

In a complaint alleging two causes of action, plaintiffs sought to recover on a policy of marine insurance and in tort. The district court gave judgment for defendant on both causes of action. Plaintiffs appeal and we affirm.

Plaintiffs' alleged causes of action arose with respect to the yacht TEHO, owned by the individual plaintiffs and turned over to the corporate plaintiff, Nautilus Virgin Charters, Inc. (Nautilus), as charter broker. Nautilus insured the yacht with defendant. While on charter, the TEHO was seized by the government of Colombia because it was being used to transport bales of marijuana.

Plaintiffs' cause of action on the policy was grounded upon the contention that the loss was caused by barratry and that barratry was an insured risk. Their cause of action in tort was grounded upon the contention that defendant learned that the yacht could have been released upon payment of a fine of ten percent of its value but that defendant, or its agents, failed to communicate this fact to plaintiffs in violation of an alleged duty to do so.

The district court, in granting judgment for defendant, ruled that while barratry had been committed and was an insured risk, the proximate cause of plaintiffs' loss was seizure, a peril specifically excluded from coverage. It ruled also that defendant had no duty to report the conditions under which the yacht could be reclaimed since the loss was not covered by the insurance policy.

We agree with the district court. We affirm on its opinion. Nautilus Virgin Charters, Inc. v. Edinburgh Insurance Co., Civ. No. H-79-1048 (D. Md. April 7, 1981) (unreported).

AFFIRMED.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

NAUTILUS VIRGIN CHARTERS, INC.;
HILLIARD L. LUBIN
and
AILEEN G. LUBIN
Plaintiffs

v.

EDINBURGH INSURANCE COMPANY, LTD.
Defendant

Civil No. H-79-1048

Filed: April 7, 1981

Francis J. Gorman and Semmes, Bowen & Semmes, Baltimore, Maryland, for plaintiffs.

Manfred W. Leckszas, Geoffrey S. Tobias, Linda K. Boyd and Ober, Grimes & Shriver, Baltimore, Maryland, for defendant.

HARVEY, District Judge:

This is a civil action in which the plaintiffs seek to recover damages from their insurer for the loss of a pleasure yacht. Both sides have moved for summary judgment as to the first Count of the amended complaint, and defendant has moved to dismiss the second Count. An extensive record has been developed by the parties, and the Court concludes that this case is well suited for disposition by way of the pending motions. The issues have been exhaustively briefed, and oral argument has been heard in open court.

The following facts are not disputed. On November 15, 1978, two of the plaintiffs in this case, Hilliard L. Lubin and his wife, Aileen G. Lubin (hereinafter "the Lubins"), purchased a forty-five foot auxiliary ketch, the TEHO, from Nautilus Yacht Sales in Annapolis, Maryland. Two days later, the Lubins entered into a Charter Brokerage Agreement with Nautilus Virgin Charters, Inc., the third plaintiff in this case (hereinafter "Nautilus"). Under the terms of this Agreement, the TEHO was delivered on December 1, 1978 to Nautilus' facility on St. Thomas, U.S. Virgin Islands, for use as a charter vessel. Around this time, the defendant, Edinburgh Insurance Company, Ltd. (hereinafter "Edinburgh"), added the TEHO to a Yacht Insurance Policy it had previously issued to Nautilus and to individual owners of yachts managed by Nautilus. The Lubins were added as additional insureds.

On November 22, 1978, Nautilus and the Lubins entered into a Yacht Charter Agreement with Harold P. McKay, Sr. (hereinafter "McKay, Sr.") for the charter of the TEHO for the month of January 1979. In the Charter Agreement, the charterer had agreed to limit his cruising to the Virgin Islands, but following the payment of an additional premium to Edinburgh, the navigation limits were extended "to cover as far south as the waters of Antigua, West Indies." Having paid in full for the charter,[1] McKay, Sr. boarded the TEHO on January 3, 1979, together with his wife, his son (hereinafter "McKay, Jr."), his daughter-in-law and his grandson. The McKays left St. Thomas that same day but instead of heading for Antigua, the TEHO proceeded toward Puerto Rico.

Nautilus had no further contact with McKay, Sr. until February 2, 1979, when he called the Annapolis office of Nautilus to inquire if his son had been heard from. He explained that he had injured his foot in early January, and that he, his wife and their grandson had disembarked in Puerto Rico on or about January 7, 1979 and returned to Florida. He stated that his son and daughter-in-law had remained with the vessel and intended to sail to Antigua to visit friends.

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[1] The Lubins received their share of the charter fee, some $1900, in mid-January, 1979.

Nautilus immediately filed an overdue vessel report, which was upgraded two days later to a missing vessel report. On February 8, 1979, the United States Coast Guard informed Nautilus that the TEHO was being held in South America by the government of Colombia, with her crew under arrest. The Department of State informed Nautilus that the vessel had been seized on January 17, 1979 by the Colombian Navy while it was forty miles off the coast of that country. On board the vessel were 150 bales of pressed marijuana. All persons on board were arrested, including McKay, Jr., his wife and two individuals named Paccioca and Pita, who had boarded the vessel after McKay, Sr. had left it.

After plaintiffs' efforts to recover the vessel from the Colombian authorities failed, plaintiffs filed a claim with defendant insurance company, seeking to recover under the policy which had been issued. When defendant refused to pay the claim, this civil action was brought in this Court. Both admiralty and diversity jurisdiction have been asserted.

The original complaint contained only one Count and sought recovery under the insurance policy because of alleged barratrous and other acts and deviations committed by the McKays. Following extensive discovery and after initial briefs had been filed by the parties in support of and in opposition to plaintiffs' motion for summary judgment, plaintiffs, with leave of Court, filed an amended complaint which added a second Count. In the second Count, plaintiffs allege that defendant breached an extra-contractual duty owed to plaintiffs by not making a reasonably diligent effort to ascertain the facts surrounding the seizure of the TEHO, by not assisting the plaintiffs in recovering the yacht and by not keeping plaintiffs reasonably well informed of its intentions in connection with plaintiffs' claim. In moving to dismiss the second Count, defendant contends that it owed no duty to plaintiffs once it had decided to deny coverage under the policy.

I

Insofar as Count I is concerned, the essential question presented is whether the Yacht Insurance Policy issued by the defendant covers the loss of plaintiffs' yacht under the circumstances described. In their motion for summary judgment, plaintiffs assert that the undisputed facts establish that the loss is covered. In its motion for summary judgment, defendant contends that there is no coverage because of various provisions and exclusions contained in the insurance policy.

Two defenses of substance are presented to the claims asserted under this insurance policy. Defendant has contended (1) that the proximate cause of the loss was the seizure of the yacht by the Colombian government and that, since loss by seizure is specifically excluded by the insurance policy, plaintiff is not entitled to recover here; and (2) that plaintiffs are not entitled to recover because the loss occurred outside the geographic limits of the policy.[2] For the reasons set forth herein, this Court concludes that defendant is entitled to summary judgment because the proximate cause of the loss was the seizure of the yacht by the government of Colombia.

Several preliminary points may be disposed of summarily. Defendant has argued that plaintiffs have failed to establish a loss. There is no merit to this contention. It is undisputed that the TEHO was seized by Colombian authorities on January 17, 1979 and that the yacht has not been returned to the possession of the plaintiffs. Certainly, more than a reasonable period of time has elapsed. Whether this be deemed a constructive loss or a total loss, recovery of the TEHO at this late date is certainly unlikely. *See* W. Winter, *Marine Insurance*, at 392 (3d Ed. 1952); J. Goodacre, *Marine Insurance Claims*, at 575 (1st Ed. 1974). The record here establishes that plaintiffs have sustained a loss and would be entitled to recover if that loss were covered by the insurance policy.

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[2] Other defenses asserted by Edinburgh are without merit.

Defendant has also argued that the facts of this case do not show that barratry occurred. In *The Republic of China v. National Union Fire Insurance Co. of Pittsburg,* 151 F. Supp. 211 (D.Md. 1957), *aff'd in part and rev'd in part,* 254 F.2d 177 (4th Cir. 1958), *cert. denied,* 358 U.S. 823 (1958), Chief Judge Thomsen of this Court had occasion to determine whether a loss under certain policies of marine insurance was caused by barratry. Judge Thomsen adopted the classic definition of barratry given by Lord Ellenborough in *Earle v. Rowcroft,* 8 E. 126, 138 (1806), as follows:

> "* * * a fraudulent breach of duty by the master, in respect to his owners; or, in other words, a breach of duty in respect to his owners, with a criminal intent, or *ex maleficio,* is barratry. And with respect to the owner of the ship or goods, whose interest is to be protected by the policy, it can make no difference in the reason of the thing, whether the prejudice he suffers be owing to an act of the master, induced by motives of advantage to himself, malice to the owner, or a disregard to those laws which it was the master's duty to obey, and which (or it would not be barratry) his owners relied upon his observing."

Judge Thomsen went on to say the following:

> The English Marine Insurance Act, 1906, Sch. I, Rule 11, provides: "The term 'barratry' includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer." This definition is accepted in America as well as in England. *Arnould,* sec. 839; 1 *Phillips on Insurance* (5th Ed., N.Y. 1867), sec. 1062; *Patapsco Ins. Co. v. Coulter,* 3 Pet. 222, 28 U.S. 222, 7 L.Ed. 659; *Greene v. Pacific Mutual Ins. Co.,* 9 Allen 217, 91 Mass. 217. Wilful nonfeasance of the master, doing nothing, if productive of mischief to the owner, may be barratry. *Patapsco Ins. Co. v. Coulter, supra.* If the captain deviates, or is compelled by the crew to deviate the vessel from its

> proper course and to put into an unauthorized port in fraud of his or their duty to owners, it is barratry. * * *

In affirming the major portion of Judge Thomsen's opinion, the Fourth Circuit specifically approved this definition of barratry. *National Union Fire Insurance Co. of Pittsburgh v. The Republic of China*, 254 F.2d 177, 182 (4th Cir. 1958). In his opinion, Judge Soper characterized the above excerpt from Judge Thomsen's opinion as setting out "the generally accepted definition of the offense of barratry * * *."

The facts here clearly establish that barratry occurred under this definition. Whether or not McKay, Sr. knew of and participated in the illegal drug smuggling acts of McKay, Jr., the father, who at the outset of the voyage was the master of the vessel, turned the TEHO over to his son in Puerto Rico. A wrongful act was clearly committed by the son, who was a member of the crew when the TEHO left the Virgin Islands and who was left in complete control of the yacht when McKay, Sr. left in Puerto Rico. When McKay, Jr. took the TEHO past the waters of Antigua, there was a deviation of the vessel beyond its proper course to the prejudice of the owners of the vessel. Smuggling by the master or crew of a vessel has been recognized by various authorities as amounting to barratry. *The Republic of China v. National Union Fire Insurance Co. of Pittsburgh, supra; Cory v. Burr*, 8 App. Cas. 393 (1883); *Vallejo v. Wheeler*, 1 Cowp. 143 (1774); *Havelock v. Hancill*, 3 T.R. 277 (1789). On the record here, this Court finds and concludes that the acts of McKay, Jr. clearly amounted to barratry under the definition approved by the Fourth Circuit in the *Republic of China* case.

Defendant argues that McKay, Sr. was the owner *pro hac vice* of the vessel and that there can be no barratry since he participated in the wrongful acts. A similar argument was rejected by Judge Thomsen in the *Republic of China* case. 151 F.Supp. at 228. The real owners here were the Lubins, and there is no substance to any contention that they were parties to the barratrous acts.

The next question presented is whether this policy covers a loss occasioned by barratry. The Yacht Insurance Policy issued by Edinburgh "covers subject to the exclusions and limitation of this policy, against ALL RISKS of physical loss or damage to the property covered from any external cause * * *." An all-risks clause includes loss for traditional perils of the sea, including barratry of the master or the crew. Gilmore & Black, *The Law of Admiralty* at 71 (2d Ed. 1975). Thus, if this loss was caused by barratry, plaintiffs are entitled to prevail.

The principal defense of defendant is that this loss was caused by seizure, which is not covered by the policy. Specifically excluded under the "EXCLUSIONS" provisions of the policy is "Any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or any attempt thereat, or any taking of vessel by requisition or otherwise, whether in the time of peace or war and whether lawful or otherwise; * * *." The facts here clearly indicate that there was a seizure of the TEHO by authorities of the government of Colombia. Thus, the critical issue presented is whether the proximate cause of the loss was the barratry that occurred or whether the proximate cause of the loss was the seizure. If the latter, there is no coverage and defendant is entitled to prevail. If the former, plaintiffs would be entitled to judgment, provided, of course, that no other provision of the insurance policy would defeat such recovery.

The Supreme Court has defined "proximate cause" in the insurance field as being "that cause which is most nearly and essentially connected with the loss as its efficient cause." *Standard Oil Co. v. United States,* 340 U.S. 54, 58 (1950). The parties have cited numerous texts and decisions from many different jurisdictions applying principles of proximate causation to particular factual circumstances. Whatever approach may have been taken by courts elsewhere, this Court concludes that in this District and Circuit the controlling law to be applied in a case of this sort was set forth in *The Republic of China v. National Union Fire Insurance Co. of Pittsburgh* decision of Judge Thomsen, as affirmed in large part by the Fourth Circuit.

Indeed, as in this case, the principal issue in *Republic of China* was the question of proximate causation.

In *Republic of China*, suits had been brought on various marine policies to recover for the loss of seven vessels which had been sold by the United States to the Nationalist government of China, subject to certain mortgages. The ships were being operated by the Nationalist government through a government-owned corporation when most of the masters, officers and crews of the seven vessels defected in January 1950 to the Chinese Communist regime. The masters and crews ran up the Red flag on their respective ships and held the vessels for the Communist government. They had previously disobeyed orders of the owner of the ships by entering or remaining in a British port and by refusing to sail to Taiwan or Japan. As stated by Judge Thomsen: "The principal question in each case is whether the loss was caused by 'barratry', or by 'seizure', or by both, as those terms are used and understood in the marine insurance field." 151 F.Supp. at 215.

In discussing the issue of proximate causation, Judge Thomsen said the following (151 F.Supp. at 230-231):

> The general rule of proximate cause is stated in the opinion of Chief Justice Hughes in *Lanasa Fruit Steamship & Importing Co. v. Universal Insurance Co.*, 302 U.S. 556, 58 S.Ct. 371, 82 L.Ed. 422, in which he approves the discussion of the subject by Lord Shaw in *Leyland Shipping Co. v. Norwich Union Fire Ins. Soc.*, (1918) A.C. 350, 368-371. "Causation is not a chain but a net." We must seek "the real efficient cause" of the loss. 302 U.S. at pages 562, 563, 58 S.Ct. at page 374.
>
> Libelants contend that a special rule of proximate cause is applied in barratry cases; that if barratry is a cause of the loss, recovery may be had under a policy insuring against barratry, even though the immediate cause of loss may not have been covered by the policy. Whether or not such a special rule exists for barratry cases has been hotly debated

> in England. *See* discussion by the various law lords in *Cory v. Burr*, 8 App.Cas. 393, and by *Arnould*, sec. 858, n.32. It would prolong this opinion unduly to review that controversy here. I conclude that where barratry is one of the causes of the loss, if the ultimate cause (such as stranding or capture) is not excluded from coverage by a warranty or an exclusion clause, recovery may be had on the grounds of barratry, whether or not the ultimate cause of loss was or was not a peril insured against. *See e.g., Arcangelo v. Thompson*, 2 Camp. 620. But where the ultimate cause of the loss is excluded from coverage by a warranty or an exclusion clause, recovery may not be had on the grounds of barratry. *See Cory v. Burr, supra; Swan v. Union Insurance Co.*, 3 Wheat. 168, 16 U.S. 168, 4 L.Ed. 361.

Like the insurance policy in this case, each of the policies in the *Republic of China* case specifically excluded a loss by seizure. As Judge Thomsen said at 151 F.Supp. 211: "Therefore, if there was a seizure, and if it was the ultimate cause of the loss, there can be no recovery."

There were seven vessels involved in the *Republic of China* case. After reviewing the facts, Judge Thomsen concluded that insofar as six of them were concerned, the losses had been caused by acts of barratry and were therefore covered by the insurance policy. Relying on the opinion of Chief Justice Bigelow in *Greene v. Pacific Mutual Life Ins. Co.*, 91 Mass. 217 (1864), Judge Thomsen found that there had been no seizure of these six vessels as that term has been interpreted by English and American law. Insofar as the seventh vessel was concerned, Judge Thomsen concluded that there had been a seizure, and that therefore the loss of the seventh vessel was not covered by the insurance policies.

On appeal, the Fourth Circuit, in an opinion by Judge Soper, affirmed Judge Thomsen insofar as his findings and conclusions on the six vessels were concerned, but reversed his finding and conclusion as to the seventh vessel. Judge Soper also relied on the *Greene* case in concluding that the term

"seizure" does not include a violent taking of possession of a ship by its mutinous crew. 254 F.2d at 185. However, the Fourth Circuit found that like the other six ships, the seventh had also involved a breach of trust, which amounted to a barratrous taking rather than a seizure.[3]

This Court concludes that both Judge Thomsen and Judge Soper approved the rule of proximate causation as set forth in the House of Lords' decision in *Cory v. Burr*, 8 App.Cas. 393 (1883). The facts of the *Cory* case are quite similar to the facts of this case. There, the master of a vessel used it to smuggle tobacco into Spain without the knowledge or consent of the vessel's owner. Thereafter, Spanish customs officials seized the ship. The owner sought to recover under his insurance policy which, like the one in this case, covered a loss caused by barratry but not one caused by seizure of the vessel. In affirming an appeal from a judgment of the Court of Appeal which had affirmed a judgment of the Queen's Bench Division in favor of the insurer, the House of Lords concluded that a clear case of barratry had been shown, followed by a seizure by Spanish officials. The question presented was whether the proximate cause of the loss was the barratry or the seizure. In a well-reasoned opinion, the House of Lords concluded that the loss was caused by the seizure and not by the preceding barratrous acts. As Lord Blackburn stated (on pages 400-401):

> Now here they are "warranted free from capture and seizure and the consequences of any attempts thereat." It was argued that here they have not been warranted free from barratry. That is true, but the barratry would itself occasion no loss at all to the parties insured. If it had not been that the Spanish revenue officers, doing their duty (they were quite right in that respect), had come and seized the ship, the barratry of the captain in coasting along there, hovering as we should call it along the coast, in order that the small smuggling vessel might come and take the tobacco, would have done the assured no harm at

[3] Judge Soper agreed that the principal question in the case was whether the loss was caused by barratry, by seizure or by both. 254 F.2d at 178.

> all. The underwriters do undertake to indemnify against barratry; they do undertake to indemnify against any loss which is directly sustained in consequence of the barratry; and in this case, as I said before, I think the seizure was as direct a consequence of the barratry as could well be. But still, as Mr. Justice Field says, it was the seizure which brought the loss into existence—it was a case of seizure.

Lord Bramwell discussed the issue in these terms (at page 403):

> Now it is said here that the loss was not from the seizure but that in truth it was from the barratry; and it is ingeniously suggested by Mr. Tyser that the seizure was "an intermediate step," as he called it. But it was the ultimate and final step which occasioned the loss; and but for the payment of money the ship would have been confiscated, which would have been merely a following up of the seizure.

Lord Bramwell then added the following comment (at page 404):

> But then it is said that when barratry is the causa remota of the loss, it nevertheless may be relied upon without reference to the causa proxima. Now I will say nothing as to any general rule except to express a doubt as to whether what Lord Justice Brett said about that matter is perfectly correct. I have a misgiving about it; but I do not consider it necessary to determine anything of that sort here. It is possible that in some cases, where there has been barratry and a consequent loss within the perils insured against, you might call that a loss by barratry. In my opinion you cannot do so in this case. Call it an ultimate loss if you like, that ultimate loss was caused by a seizure, and that was warranted against.

Judge Thomsen adopted and applied the *Cory v. Burr* rule in the *Republic of China* case. He concluded that where barratry was one of the causes of the loss, recovery might be had if the ultimate cause were not excluded from coverage by an exclusion clause. 151 F.Supp. at 231. But he pointed out that "where the ultimate cause of the loss is excluded from coverage by a warranty or an exclusion clause, recovery may not be had on the grounds of barratry. *See Cory v. Burr, supra* * * *." *Id.* at 231.

Plaintiffs contend first that Judge Thomsen "did misstate" the proximate cause rule which should be applied in a case such as the one before him. Plaintiffs argue that the proper rule was the one set forth in *Havelock v. Hancill,* 3 T.R. 277 (1789) and *Earle v. Rowcroft,* 8 E. 126 (1806). But these early English cases were in effect overruled by the *Cory v. Burr* decision. Both of these cases had been brought to the attention of Judge Thomsen since he cited *Earle v. Rowcroft* and since *Cory v. Burr* cited *Havelock v. Hancill.* Moreover, the question whether English or American law should be applied was also considered and discussed by Judge Thomsen in the *Republic of China* opinion. In this connection, Judge Thomsen said the following (151 F.Supp. at 226):

> Indeed, the conflict of laws problem is more apparent than real. "The important thing is to secure uniformity of view in a commercial world, which now embraces and long has included more than one continent and more than one ocean." *Queen Ins. Co. of America v. Globe, etc., Co.,* D.C.S.D.N.Y., 278 F.770, 781, *aff'd* 2 Cir., 282 F. 976, and 263 U.S. 487, 44 S.Ct. 175, 68 L.Ed. 402. The Supreme Court referred to the "special reasons for keeping in harmony with the marine insurance laws of England * * *." 263 U.S. 487, 493, 44 S.Ct. 175, 177. More recently the Supreme Court has stated: "It is true that we and other American courts have emphasized the desirability of uniformity in decisions here and in England in interpretation and enforcement of marine insurance contracts. Especially is uniformity desirable

> where, as here, the particular form of words employed originated in England. But this does not mean that American courts must follow House of Lords' decisions automatically. Actually our practice is no more than to accord respect to established doctrines of English maritime law." *Standard Oil Co. of New Jersey v. United States*, 340 U.S. 54, 59, 71 S.Ct. 135, 138, 95 L.Ed. 68. Applying these principles, I have considered precedents from both sides of the Atlantic.

Thus, it is apparent that Judge Thomsen in the *Republic of China* case adopted the *Cory v. Burr* rationale, fully appreciating that other earlier precedents had taken a different tack. Counsel have cited no authority indicating that *Cory v. Burr* is not still the rule in England for interpreting and enforcing marine insurance contracts. Certainly then, good reason exists for the adoption of a similar rule in the United States so that uniformity may be achieved.

Plaintiffs have also argued that Judge Thomsen's discussion of the proximate causation rule in the *Republic of China* cause is mere dictum as applied to the facts of this case. This Court would disagree. As indicated early in the *Republic of China* opinion, the principal issue was whether the loss was caused by barratry or by seizure or by both "as those terms are used and understood in the marine insurance field." 151 F.Supp. at 215. Thus, it was necessary to ascertain the applicable law before the facts of the *Republic of China* case could be applied to that law. Accordingly, Judge Thomsen first concluded that *Cory v. Burr* stated the law to be applied, and that there could be no recovery if a barratry were followed by a seizure and if seizure were excluded from coverage. Once having determined the law to be applied, Judge Thomsen concluded that there had been no seizure insofar as the six vessels were concerned, while there had been a seizure as to the seventh. These determinations of fact were then applied to the *Cory v. Burr* rule and coverage was found as to six of the vessels but not as to the seventh.

It is also argued by the plaintiffs that the Fourth Circuit did not follow Judge Thomsen's ruling concerning the application of the proper rule of proximate causation to facts such as those here. Again, this Court would disagree. At page 185 of the Fourth Circuit opinion in the *Republic of China* case, Judge Soper said the following:

> The respondent also relies on the decision in *Cory v. Burr*, 8 App. Cas. 393 (1883). In that case the captain of a ship, disregarding his obligation to the owners in order to serve his own ends, used the vessel in smuggling transactions, and while she was stopped at sea in order to transship the smuggled goods she was taken by a Spanish revenue cutter. It was held that the loss was caused not by the barratry of the master but by the seizure of the ship by the Spanish Government. This holding distinguishes the decision from the instant case where it has been found that the barratrous acts constituted the ultimate and efficient cause of the loss of the Hong Kong ships, since it was brought about by the voluntary acts of the masters and crews in possession and was not compelled by the superior forces of the Communist Government. This is the more clear in the case of the Hai Hsuan [the seventh vessel] since the defection of her crew began on the high seas beyond any possible reach of the communist forces.

Relying on this portion of the opinion, plaintiffs argue that the Fourth Circuit did not follow *Cory v. Burr* but instead distinguished it. But, the *Cory* decision was distinguished by Judge Soper not on the law but on its facts. As Judge Soper pointed out, there was no seizure in the *Republic of China* case because there was no action taken by a government or by government officials. In both the pending case and *Cory v. Burr*, there was a seizure within the language of the insurance policy because the action had been taken by government officials. Had the Fourth Circuit wished to overrule Judge Thomsen's interpretation of the law and follow the earlier English cases, there was no need for it to consider whether the

facts amounted to a seizure inasmuch as there would have been coverage whether or not the barratry was followed by a seizure.

A bitterly contested case involving in excess of $3 million, the *Republic of China* opinions were handed down some twenty-three years ago. Since then, there has not been a single reported opinion in this Court or in the Fourth Circuit questioning the principle of law established by *Republic of China* for determining whether a loss such as this one was proximately caused by barratry or by a later seizure. It must therefore be concluded that whatever the rule may be elsewhere, in this Circuit *Cory v. Burr* is controlling in a case such as this one. Accordingly, this Court finds and concludes that the loss of the TEHO was proximately caused by the yacht's seizure by Colombian officials and not by the earlier barratrous acts of McKay, Jr. Since loss by seizure is excluded by the express terms of the insurance policy, plaintiffs are not entitled to recover.[4]

II

In Count II of their amended complaint, plaintiffs allege that they are entitled to judgment because of what Edinburgh did in denying coverage and thereafter. Whereas Count I seeks recovery for breach of contract, Count II is based on a theory of tort. Plaintiffs allege in Count II that defendant acted negligently and in bad faith in investigating the loss, in failing to assist plaintiffs in an attempt to recover the yacht, in failing to keep plaintiffs informed and in failing to exercise due diligence and reasonable skill after coverage was denied. In moving to dismiss Count II, defendant contends that no duty owed by it to the plaintiffs was breached. In opposing the motion to dismiss, plaintiffs have relied on several depositions and exhibits filed in this case. Accordingly, this Court will treat the pending motion to dismiss as a motion for summary judgment. *See* Rule 12(b), F.R.Civ.P.

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[4] In view of this Court's conclusion that the loss of the TEHO was not covered because of the "Exclusions" provisions of the policy, it is not necessary to consider whether plaintiffs are also barred from recovery because they violated the geographic limits of the policy.

Under Count II of the amended complaint, plaintiffs are asking this Court to recognize a new basis for liability in a case in which the insured was advised that a loss was not covered and in which the Court has found no coverage. Here, defendant knew from the outset that the loss of the TEHO had been the result of the yacht's seizure by the government of Colombia. Indeed, it was John D. Wells, Executive Vice President of Nautilus, who, on February 9, 1979, informed Edward W. White, Managing Director of Edinburgh, that the yacht had been seized by the Colombian government "for running pot." White immediately advised Wells that the loss was not covered under the policy. This was a preliminary denial, and the formal denial followed some three months later. Meanwhile, Edinburgh investigated the loss on its own and furnished certain information to the plaintiffs in an effort to assist them in recovering the TEHO.

In Count II, plaintiffs assert that even though defendant denied coverage from the outset and even though the loss in question may be excluded from the policy, they are still entitled to judgment under a theory of tort because of what defendant did after it learned that the yacht had been seized. This Court concludes that no extra contractual duty of the type relied upon by plaintiffs was owed by Edinburgh to its insureds. No admiralty or other case involving marine insurance is cited by plaintiffs in support of their novel theory. Indeed, plaintiffs have cited not a single federal case which has recognized a duty of this sort. Some state cases have recognized a duty on the part of an insurer to deal fairly and in good faith with its insured. *See Gruenberg v. Aetna Life Insurance Company*, 510 P.2d 1032 (Calif. 1973) and cases cited therein. However, in those cases, the loss in question was covered by the insurance policy, and the issue was whether the insurance company failed to deal with the insured fairly and in good faith by refusing without proper cause to compensate the insured for the loss. *Id.*, at 1037. Other jurisdictions, even where the loss is covered, have refused to recognize any such cause of action in tort resulting from allegations of an insurer's wrongful refusal or

delay in settling a first-party claim. *Lawton v. Great Southwest Fire Ins. Co.*, 392 A.2d 576, 581 (N.H. 1978).

In any event, even if such a cause of action in tort were to be recognized by this Court, plaintiffs would not be entitled to a recovery here. In this case, the loss was not covered by the insurance policy. Assuredly, the defendant should not be held liable for acts taken after it correctly interpreted the policy and advised its insured that there was no coverage. After denying coverage, representatives of Edinburgh did assist Nautilus and the Lubins in determining whether the TEHO could be recovered from the Colombian government. Commencing in the spring of 1979, Mr. Lubin himself undertook efforts to recover his yacht, contacting the Colombian Ambassador to the United States, who made inquiries through the Ministry of Justice in Colombia. After having been advised by the Colombian Ambassador that he had been granted rights of ingress and egress to survey the TEHO in Colombia, Mr. Lubin decided not to make a personal trip because of advice he received that under Colombian law, the owner of a yacht under circumstances such as these is presumed to be guilty for any violations of law with which the yacht might have been connected.

Plaintiffs complain that this and other information was passed along to Edinburgh, but that Edinburgh took no steps to recover the yacht from Colombia. The simple answer to this contention is that Edinburgh had no duty to take any action since there was no coverage. An insurer can hardly be expected to take steps to investigate and mitigate a loss when it has correctly concluded that the loss is not covered by the insurance policy in question. Plaintiff Lubin himself investigated the circumstances whereby steps might be taken to survey or recover his yacht and decided for reasons of his own not to go to Colombia.

For these reasons, this Court concludes that plaintiffs are not entitled to a recovery against defendant under Count II of the amended complaint. Defendant's motion to dismiss, treated herein as a motion for summary judgment, will therefore be granted.

III

For the reasons stated, plaintiffs' motion for summary judgment is hereby denied; defendant's motion for summary judgment is hereby granted; and defendant's motion to dismiss Count II of the amended complaint, treated herein as a motion for summary judgment as to Count II, is hereby granted. Accordingly, judgment is hereby entered in this case in favor of the defendant, with costs.

ALEXANDER HARVEY

United States District Judge

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With CBS News Correspondents
Mike Wallace, Morley Safer and Dan Rather

"MIXED MARRIAGES"—Produced by Jeanne Solomon
"PIRATE'S LADY"—Produced by Jim Jackson
"OUT OF THIS WORLD"—Produced by Imre Horvath

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["PIRATE'S LADY"]

MORLEY SAFER: A year ago we reported about drugs and hijacking and piracy, and about murder as well. Mostly it was about a number of fast, expensive and beautiful yachts, like this one, Pirate's Lady, that have disappeared. The Pirate's Lady disappeared 18 months ago without a trace, but it was only one in a pattern of a number of missing yachts. The assumption is that these yachts have been hijacked, either in port or on the high seas, by drug smugglers, who, under the cover of pleasure boating, are smuggling hundreds of millions of dollars' worth of drugs into the United States from Colombia, Venezuela, Mexico, and the Caribbean Islands. And so, in certain American seaports the people who own and work the boats—people like Captain Jim Blake of New Orleans—are just plain scared.

CAPTAIN JIM BLAKE: Well, personally, I believe they're using the boats for narcotics, and then—and then scuttling them.

SAFER: Since these hijackings, what's the mood among you fellows in these waters?

CAPTAIN BLAKE: Well, we're—we're very concerned about it. These two recent hijackings, and I think there's been hijackings before; boats have disappeared in various places. And most of the fellows that I know now carry a gun on deliveries, and—and they never used to. The only time you ever carried a gun before was for sharks, but most of the fellows now are carrying handguns and that thing—that sort of thing because of the hijackings.

SAFER: You doing that too?

BLAKE: Yes, sir. I carry a gun when I go on a trip now.

SAFER: Drugs come in by truck and by plane. But more and more now, they are coming in by luxury yacht to American marinas, and to hundreds of secret drops along the coasts. Hardly a week goes by that a yacht, fully laden with drugs, is not seized. But authorities admit that these seizures represent barely a trickle of the full traffic. But where do the drug runners

get the boats? Well, with the boating industry now a $5-billion business, they have plenty to choose from. And the people who own boats think that when they buy them, they are buying more than a weekend escape. They are buying freedom from the cities, with their dirt and their drugs and their crime.

There's no question that the yachting life is the good life; maybe the best life. Perhaps the only people left in this country who don't have to lock their doors at night are the people who live on big boats. Well, all that's over. From Marina del Ray in the Pacific to New Orleans on the Gulf of Mexico to here at Fort Lauderdale, boat owners feel threatened by something as old as the sea itself—piracy. Not romantic storybook piracy, but cold-blooded murder. Take the case of the aptly named cruiser Pirate's Lady out of New Orleans, a sleek one million dollar yacht built for pleasure. And one day she just vanished.

Pirate's Lady was built by the Burger Boat Company to owner specifications: seventy-five feet long. She had every conceivable safety device on board, and the most modern communications equipment available. She was owned by Charles Slater, a New Orleans millionaire, who made his fortune in the shipping business. On Tuesday, January 25th, she was tied up at the marina at New Orleans, preparing to cruise to Clearwater, Florida, to pick up Slater and take him on a fishing trip to the Bahamas. She left the marina at 6:20 AM. On board was Captain Tony Latuso, forty-six, a trusted professional skipper; and a deckhand, twenty-year-old David Diecidue, the son of Slater's accountant.

On Wednesday at four PM, Pirate's Lady pulled in here at the small marina at Apalachicola, Florida. They talked to the marina owner and gassed up, and said they were planning to leave the next morning. The dock owner, Cleve Randolph, never saw them after that, but a motel manager heard the boat leave the next morning.

CLEVE RANDOLPH: Our manager at the Rainbow Motel heard the engines around six o'clock. In fact, he saw the lights on the boat pull away from the dock, you know, and the boat proceeded on southward, he—he thinks—

SAFER: Under the bridge?

RANDOLPH: —just under the bridge.

SAFER: And she could have cleared that bridge—

RANDOLPH: Yes, sir.

SAFER: —without the—the drawbridge opening?

RANDOLPH: The boat could have cleared that bridge, because the boat was about 26 feet high, and the bridge is 28 feet; but it would've had to lower the antenna, which is no great problem.

SAFER: An that was the last of Pirate's Lady?

RANDOLPH: Except that the shrimp boat Rainbow saw it five miles off-shore of St. George Island.

SAFER: Captain of the shrimp boat Rainbow is Jim Newton.

JIM NEWTON: He was making pretty good speed. they—I didn't see him when he come across my bow, and so it'd be hard to really—but the way the spray was flying, I mean, all you could see—just the water, you know.

SAFER: And you're sure it was Pirate's Lady?

NEWTON: I'm pretty sure. From what I seen, I'd say it was, yeah.

SAFER: And that would have been at what time?

NEWTON: About eight o'clock.

SAFER: That was Thursday morning. Neither Pirate's Lady nor the crew was ever seen again. Friday morning, Slater alerted the Coast Guard. Friday evening, the helicopter search began with a mission like this one. They expanded the search on Saturday, and by Sunday they had nine aircraft up. But not a trace—no sightings, no debris, no distress calls.

PILOT: Okay, there's another one up here, a sport fisherman, that meets somewhat of the description. We'll check him out.

SAFER: They continued the search until Tuesday, February 1st. They had covered 90,000 square miles. Finally, on Tuesday night the search was called off. But what happened to her? The search was conducted on the likelihood that Pirate's Lady had foundered or sunk. But the owner, Charles Slater, thinks that was next to impossible.

CHARLES SLATER: When they found absolutely nothing, then they called the search off. Now, upon my questioning them, they said that, well, they didn't feel that the vessel was there, that the vessel was not in that area. And I asked them, I said, "Where—you know, has happened to the vessel and the two men on board?" And they have no explanation for this.

SAFER: Head of operations at Coast Guard headquarters, Commander Lawrence Kindbom.

In the case of a hijacking, there isn't really a heck of a lot that the Coast Guard can do.

COMMANDER LAWRENCE KINDBOM: Well, if we know it's being hijacked—

SAFER: Which is unlikely.

COMMANDER KINDBOM: That's true, because a—a hijacking that's carried off perfectly is—is like the perfect crime. It is a perfect crime.

SAFER: I'm told by the people in Florida that those sea lanes coming up from the South are virtually superhighways for drug smugglers. Do you feel that you're really effectively stopping it, or just getting the odd man?

COMMANDER KINDBOM: Well, the Coast Guard is—is, of course, involved in assisting the Drug Enforcement agency in this area, and working rather closely with Customs.

SAFER: What percentage are you stopping?

COMMANDER KINDBOM: Well, I've seen anyplace from three to five percent—which is not much.

SAFER: It's the price—small price of doing business, if you're in the drug business.

COMMANDER KINDBOM: I think that would be a good way to look at it, yes. It's a very lucrative business; the opportunity to make a rather substantial profit is very great. The risk is—with those odds—is— is rather slim.

SAFER: Would a boat like Pirate's Lady be the kind of boat a drug smuggler would want to use?

COMMANDER KINDBOM: Yes, it would. Yes, it would.

SAFER: What does your intelligence tell you happened between the point at which some heard the Pirate's Lady engines crank up on Thursday morning and the disappearance of the ship?

SLATER: Someone could have gotten on board during the night, and been concealed in the flying bridge of the vessel. Then when he went up there, they could have put a gun or whatever means they used and taken forcibly control of the vessel. This would have made it start on the dock, in other words, at Apalachicola. Now, the only other method that we can presume is that someone would have sent a false distress signal or something such as that offshore, and he went to help them.

SAFER: If Pirate's Lady had been the only disappearance, Slater might have written it off as one of those mysteries of the sea. But in fact, over the past five years possibly hundreds of yachts have been hijacked at sea. Just three months before—October, 1976—the 43-foot Flying Dutchman also pulled out of Apalachicola with four people on board. She's never been seen again. Just how many boats have been hijacked depends on who you talk to. Commander Kindbom has one set of numbers.

COMMANDER KINDBOM: Since the first part of 1971, we're talking essentially—according to Coast Guard records, now; that is, vessels that have been reported and in the Coast Guard system, vessels we've searched for, which would be the—the way it would come into our system—we're talking about 44 vessels.

SAFER: If you—as you say, there are 44 vessels missing, how many people are missing?

COMMANDER KINDBOM: It's 44 boats that possibly could fit the hijacking scheme, and we're talking about 200 and—a little over 200 people.

SAFER: No trace?

COMMANDER KINDBOM: With no trace, that's correct.

SAFER: Would you admit that your figures are conservative?

COMMANDER KINDBOM: Oh, I—I—I would say definitely they probably would be, yes. Certainly.

REP. JOHN MURPHY [D-New York]: We have statistics through a four-year period of over 600 yachts disappearing under mysterious circumstances.

SAFER: Representative John Murphy of New York heads the House Merchant Marine and Fisheries Committee.

REP. MURPHY: Of course, if we use the Coast Guard criteria of those that are directly involved in a yachtjacking for drug purposes, they say 44. Well, obviously, where a yachtjacking has occurred where they've taken the boat, murdered the—the crew or the owners on board, and then made a drug run and scuttled the ship, we're not going to find definitively under their criteria that this was a drug-related yachtjacking. So I-I think we have to have a little broader interpretation of the Bible, in this instance.

SAFER: Whatever number of boats have been hijacked, the people who own them and the professional skippers are frightened. Peter Gunn, an experienced transit captain who ferries yachts from Florida to the Pacific Coast via the Panama Canal.

You go about armed. Do you have any hesitation at all about using those arms, or are they simply a—a deterrent?

CAPTAIN PETER GUNN: If it's necessary for me to use arms to protect a vessel, I would use arms the same way as if I was—happened to be in a—in a war, because to me this happens to be an international situation that is developing into a war, and a person must protect himself. You must protect your vessel, you must protect your crew, you must protect your own life.

SAFER: Captain John Lamb, an Australian who works in American coastal waters.

CAPTAIN JOHN LAMB: Well, we're hiring crews differently. We're checking a little closer into the people that we hire to make the trip. We very rarely take people from the dock. This used to be the traditional way—anybody who walked past, if they wanted to go somewhere, could hop a boat and do it. That doesn't happen any more.

SAFER: The feeling is, the suspicion is, that these—a lot of these hijackings might be inside jobs, so to speak?

CAPTAIN LAMB: That's right, yeah. A lot of them are. A lot of the details of a voyage can be found out; very common knowledge around the dock some time before it starts. So these people come by, and you just absolutely have no way of knowing whether you can trust them or not. And when you're on the ocean, it's too late.

SAFER: That's what's presumed to have happened to these two Americans—the owners of the ketch Imamou. At Cartagena, Colombia, they picked up these two Frenchmen as crewmen. The Americans were never seen again. The Frenchmen said the Americans gave them the boat, and then they vanished. A private investigator who looked into the case was murdered.

What other precautions?

CAPTAIN LAMB: Well, there's always dis—distress at sea is the other thing, and distress at sea--I mean, a—a vessel in distress, the traditional—the traditionally accepted thing is to—is to help people in distress. Nowadays, you get a distress

call on the radio, and you certainly go to that area and find them; but you don't get too close.

CAPTAIN GUNN: I may go alongside or have them come alongside me, and they may have grappling hooks and they would throw them on board and pull me up to the—alongside that other vessel, and people would board me; and in a matter of minutes my total crew would be annihilated, would be weighted down, their bodies would be disposed of, and the vessel would disappear.

SAFER: Of course, the best evidence that hijacking is to be taken seriously comes from the men who insure the boats—men like Chalmers Hall, a Fort Lauderdale marine insurance broker.

CHALMERS HALL: Well, it's so serious in south Florida in—in 1977 that if you own a small boat it's practically impossible to buy theft insurance on that boat. And if you do buy theft insurance, the price is triple what it was in '74.

SAFER: If the assumption is that there was piracy, if she was hijacked—

HALL: Correct.

SAFER:—whose jurisdiction does—which law enforcement agency—?

HALL: I haven't been able to decipher this problem yet. [Laughs] I've been told by the Coast Guard that they're there to save lives and, you know, discover these accidents or wrecks or whatever they might be, and to attempt to, at all costs, save the human life. But from that point on, they're not a policing body to police the seas, to stop hijacking or stolen vessels or this, that or the other. You know, no one really wants to say who is responsible, whose problem is it. We've never been able to pin that down as to, you know, what—what particular governmental agency is responsible for this.

SAFER: Nobody says they're responsible.

REP. MURPHY: Well, that's—that's bureaucracy, because we're dealing in a—in a very complex area, and we say the Coast Guard has jurisdiction over boats; they say they don't

have jurisdiction over drugs. You go to the FBI for a murder involved, and they say, yes, we have jurisdiction for a homocide but not for drugs. You go to the Drug Enforcement Administration, and the DEA will say that, well, we don't have any craft, any personnel, to properly do this job. And you go to the State Department, and—and they say, well, go back to the other agencies.

SAFER: Charlie, were there any sightings by any of your informants?

SLATER: There has been definite, positive identification on five different occasions that we know of right now.

SAFER: All in that Caribbean area?

SLATER: What do you do if you find Pirate's Lady and she's berthed in the Bahamas, say? What do you do?

SLATER: Well, it depends. If I—if I feel that the authorities can handle it properly, I'll go to them. If not, well, I—I'll have to do my best as an individual to get it back.

SAFER: How do you do that?

SLATER: Well, I'd prefer not to go into that. I'd get it back the same way that they got it.

SAFER: What do you think happened to Pirate's Lady?

SLATER: I really don't know. [Sigh] I really don't.

WALLACE: More than a year later, Charles Slater has still not been able to get his Pirate's Lady back. He told us there have been a number of reported sightings of his yacht, or perhaps her ghost. In any case, he believes she's still out there someplace, still being used by the hijackers who took her or by someone else. But he concedes he doesn't hold out much hope he'll ever see his million dollar baby again.

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Washington, D.C. 20235

F/UD5:MLC

Mr. Francis J. Gorman
Semmes, Bowen, and Semmes
10 Light Street
Baltimore, Maryland 21201

Dear Mr. Gorman:

I promised to send you some information about the affect of barratry on our vessel financing program.

We administer a program which finances the long-term debt portion of fishing vessels construction costs. We have recently experienced a rash of barratry-related problems with our collateral vessels. In the last 18 months or so, we have experienced barratry-related problems with 15 program vessels which involved $3,918,457 worth of financing. Barratry problems have been restricted to the Gulf of Mexico and South Atlantic. Our financing portfolio there involves 414 vessels with $77 million worth of financing, so our exposure to barratry-related problems is quite large.

The barratry problem typically consists of hired vessel captains and crews committing barratrous acts with result in the vessels' loss both to their owners and to us as their mortgagee.

We believe we are going to have to litigate all these barratry cases in order to recover from the vessels' underwriters. The outcome of litigation you are presently handling is, of course, a critical factor in the Government's investment in these vessels.

Sincerely yours,

Michael L. Grable, Chief
Financial Services Division

Opposition

Supreme Court, U.S.
FILED
APR 9 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1640

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HILLIARD L. LUBIN AND AILEEN G. LUBIN,
Petitioners,

v.

EDINBURGH INSURANCE COMPANY, LTD.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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April 7, 1982

The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED

Should the Supreme Court review the decision of the United States District Court for the District of Maryland, affirmed by the United States Court of Appeals for the Fourth Circuit, which, consistent with established precedent and sound reasoning, held as a matter of law that a marine insurer issuing a yacht insurance policy specifically excluding loss due to seizure from coverage is not liable when the vessel is rightfully seized by a foreign government because her crew was engaged in smuggling?

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No. 81-1640

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HILLIARD L. LUBIN AND AILEEN G. LUBIN,
Petitioners,

v.

EDINBURGH INSURANCE COMPANY, LTD.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The respondent, Edinburgh Insurance Company, Ltd., respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE

The respondent does not disagree with those parts of the petitioners' Statement of the Case which summarize the

prior court proceedings. However, the narrative of the events preceding the seizure of the Yacht *Teho* is incomplete. Accordingly, the respondent submits the following additional facts which more fully and accurately describe the matter at issue.

The contract of insurance in question is a common yacht insurance policy, combining standard marine risks (*e.g.*, sinking, stranding and collision) with protection and indemnity (liability to third parties). The policy had a detailed list of exclusions including "any claims for loss, damage or expense caused by or resulting from . . . seizure, arrest, restraint or detainment, or the consequences thereof. . . ." The policy contained no express inclusion of barratry as a covered peril, and even if petitioners had read the policy, it is probably safe to assume that only experienced admiralty counsel could have told them that their contract of insurance included barratry. Conversely, any layman reading the policy could have learned that losses attributable to seizure were, as a matter of plain English, excluded.

In January, 1979, the Yacht *Teho* departed from St. Thomas, United States Virgin Islands, never to be seen again by any witness testifying by deposition or affidavit. While any number of calamities may have befallen her (*e.g.*, piracy, another excepted peril), the theory pursued by petitioners is barratry of the yacht's crew, a covered loss. The district court accepted petitioners' allegation of barratry, thus laying the necessary foundation for summary judgment in respondent's favor on the ground that there was no coverage, because the *Teho* was seized. Respondent stresses that all of the trial court's findings of fact are in the summary judgment context, where all reasonable inferences had to be drawn in the Lubins' favor. There has been, and need not be, any evidentiary hearing; the deposition transcripts, affidavits, and documentary evi-

dence provided by the parties allowed the trial court to gain a fair picture of at least the petitioners' version of events.

On or about November 22, 1978, a person identifying himself as Harold P. McKay, Sr., called Nautilus Virgin Charters, Inc., inquiring about charters for the month of January, 1979, apparently having learned of Nautilus by magazine advertisements. Describing himself as a truck operator about to retire, McKay, Sr., later inquired about extending the navigation limits of the charter to Antigua, some 250 miles "down island" (generally southeast) of St. Thomas. McKay, Sr., provided Nautilus with a "sailing resume," and the only verification of this material was a telephone call from the Annapolis office of Nautilus to a person identified as a business associate of McKay, Sr., to ascertain information unrelated to sailing experience. McKay, Sr., arrived in St. Thomas on January 1, 1979, with a party whom he introduced to Nautilus personnel as his wife, son (McKay, Jr.), son's wife and grandchild. On January 3, Nautilus' president, Orlin Rickard, spent perhaps three hours with the McKays "checking them out" on the *Teho*. Although Rickard was under the impression that a 300 mile cruising range had been negotiated and knew that the yacht was to be navigated over open stretches of water of at least eighty miles between islands, he was unaware of the navigation equipment or charts aboard the *Teho*, and was ignorant of any other trip preparations made by the McKays. With no arrangements for communication during the voyage having been made, the *Teho* departed from St. Thomas on January 3, never to return.

Both in the Question Presented and in the Statement of the Case, petitioners refer to the "confiscation" of the *Teho*. While the vessel was, apparently, "confiscated" by the Colombian Navy, the district court found as a fact that the *Teho* was rightfully seized by an agent of the

Colombian government, as that specific legal term is used in a policy of marine insurance. The court of appeals decision is predicated on the yacht's having been seized, not confiscated, as is, in reality, petitioners' entire legal analysis.

REASONS FOR DENYING THE WRIT

INTRODUCTION

This case involves an attempt by petitioners to recover under a marine insurance policy specifically excluding seizure from coverage. Petitioners admit that there was no loss until the yacht was seized by the Navy of Colombia. After carefully examining the case law, and reviewing the facts in a light most favorable to the petitioners, the district court and the court of appeals held, as a matter of law, that the loss was not covered by the policy. The decision of the United States Court of Appeals for the Fourth Circuit is entirely consistent with every decision heretofore rendered by American and English courts on the issue, and there are no other important reasons for hearing the case. Accordingly, the respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

I.

THE LOWER COURT DECISIONS IN THIS CASE ARE CONSISTENT WITH THE DECISIONS OF THE SUPREME COURT, THE COURTS OF APPEALS, AND THE HOUSE OF LORDS.

There is no conflict among the decisions reported in the United States and in England as to what is the rule of proximate cause in cases where a rightful governmental seizure is preceded by barratry. It is well settled that when seizure is specifically excluded from coverage, the owners of a seized vessel have no claim under the policy. As one might expect, this discreet and specific rule of simple application has not engendered significant litigation, with

the result that there are few reported decisions. Neither respondent nor, apparently, petitioners could discover any decision of this Court specifically addressing the seizure exclusion in a marine insurance policy, where barratry allegedly preceded the seizure. This dearth of direct precedent is significant for two reasons. First, it renders petitioners' conflict argument groundless. Second, it points up the relative obscurity of the issue. The only appellate decisions on point are those of the Fourth Circuit in this case and in *National Union Fire Insurance Co. v. Republic of China*, 254 F.2d 177 (4th Cir. 1958), *cert. denied*, 358 U.S. 823 (1958).

A. *The Decisions of the Supreme Court and the House of Lords Provide a Firm Basis for the Conclusion Reached Herein.*

The strict requirement of a proximate causal link between barratry and any subsequent loss was first announced by Chief Justice John Marshall in *Swan v. The Union Insurance Company of Maryland*, 16 U.S. (3 Wheat.) 168 (1818). No subsequent decision of this Court has wavered from that principle, and there is no need to address the issue now. Ever since the *Swan* case, the international and, at times, arcane world of marine insurance has been secure in the interrelation of the barratry inclusion and seizure exclusion. The leading English case of *Cory v. Burr*, 8 App. Cas. 393 (1883), relied upon heavily by those jurists who have considered the issue in this Century, is thus consistent with the earliest opinions of the Supreme Court. *Cory v. Burr* and other English decisions will be discussed below.

The decisions of this Court cited by petitioners as conflicting with the court of appeals and district court herein address factual situations quite distinct from the matter at issue. They are, nevertheless, supportive of the

rule that has consistently been applied in the few seizure-preceded-by-barratry cases that are reported, either in this country or in England. Respondent stresses that not once has this Court perceived the need to address a policy of marine insurance explicitly excluding seizure from coverage. The rule itself was well stated by Judge Thomsen in *Republic of China v. National Union Fire Insurance Co.*, 151 F. Supp. 211 (D. Md. 1957), *aff'd in part and rev'd in part*, 254 F.2d 177 (4th Cir. 1958), *cert. denied*, 358 U.S. 823 (1958).

> The general rule of proximate cause is stated in the opinion of Chief Justice Hughes in Lanasa Fruit Steamship & Importing Co. v. Universal Insurance Co., 302 U.S. 556, 58 S. Ct. 371, 82 L. Ed. 422, in which he approves the discussion of the subject by Lord Shaw in Leyland Shipping Co. v. Norwich Union Fire Ins. Soc., (1918) A. C. 350, 368-371. "Causation is not a chain but a net." We must seek "the real efficient cause" of the loss. 302 U.S. at pages 562, 563, 58 S. Ct. at page 374.
>
> Libelants contend that a special rule of proximate cause is applied in barratry cases; that if barratry is a cause of the loss, recovery may be had under a policy insuring against barratry, even though the immediate cause of loss may not have been covered by the policy. Whether or not such a special rule exists for barratry cases has been hotly debated in England. See discussion by the various law lords in Cory v. Burr, 8 App. Cas. 393, and by Arnould, sec. 858, n.32. It would prolong this opinion unduly to review that controversy here. I conclude that where barratry is one of the causes of the loss, if the ultimate cause (such as stranding or capture) is not excluded from coverage by a warranty or an exclusion clause, recovery may be had on the grounds of barratry, whether or not the ultimate cause of loss was or was not a peril insured against. See e.g., Arcangelo v. Thompson, 2 Camp. 620. *But where the ultimate cause of the loss is excluded from coverage by a warranty or an exclusion clause, recovery may not be had on the*

grounds of barratry. See Cory v. Burr, supra; Swan v. Union Insurance Co., 3 Wheat. 168, 16 U.S. 168, 4 L. Ed. 361.

151 F. Supp at 230-231 (emphasis added).

The facts surrounding the loss of the *Teho*, as found by the district court, are quite distinct from the decisions of this Court pertaining to other losses and other chains of events. The earliest case of this Court cited by petitioners is *Waters v. The Merchants' Louisville Insurance Co.*, 36 U.S. (11 Pet.) 213 (1837), which concerned a loss due to fire and explosion. *Aetna Insurance Co. v. Boon*, 95 U.S. 117 (1877), did not involve a policy of marine insurance at all, let alone seizure. *The G. R. Booth*, 171 U.S. 450 (1898), was concerned with neither seizure nor insurance; neither was *Lanasa Fruit Steamship and Importing Co. v. Universal Insurance Co.*, 302 U.S. 556 (1938). The case of *Standard Oil Co. of New Jersey v. United States (The John Worthington)*, 340 U.S. 54 (1950), involved a collision.

The only cited decision of this Court touching upon seizure is *Standard Oil Co. of New Jersey v. United States (The Llama)*, 267 U.S. 76 (1925). Therein, a loss (stranding) occurred *after* a temporary seizure by a British naval vessel. The efficient cause of the loss was found to be the British control of the *Llama* — not the inrush of sea water. The same principle would have applied to the *Teho*: if she had foundered after seizure by the Colombian Navy, the loss would still be caused by and attributed to the seizure — not the marine peril of sinking.

Omitted from petitioners' brief is *Queen Insurance Co. of America v. Globe & Rutgers Fire Insurance Co.*, 263 U.S. 487 (1924), a dispute between the war risk and marine risk insurers of a vessel lost during convoy operations in

World War I. Mr. Justice Holmes (who also authored *The Llama*, 267 U.S. 76), speaking for a unanimous Court, laid the foundation for the *Republic of China* and other decisions relied upon by respondent:

> On the other hand the common understanding is that in construing these policies we are not to take broad views but generally are to stop our inquiries with the cause nearest the loss. This is a settled rule of construction, and if it is understood, does not deserve much criticism, since theoretically at least the parties can shape the contract as they like.

263 U.S. at 492. *See also Orient Mutual Insurance Co. v. Adams*, 123 U.S. 67 (1887).

It is not disputed that the single precedent on all fours with the facts of the loss of the *Teho* as found by the district court is the English case of *Cory v. Burr*, 8 App. Cas. 393 (1883), a unanimous decision of the House of Lords, affirming the unanimous judgment of the Court of Appeal, affirming, in turn, a unanimous judgment of the Queen's Bench Division. In *Cory v. Burr*, the vessel was hovering off the coast of Spain, preparatory to smuggling, when she was seized by Spanish revenue cutters. Respondent avers that the unanimity of the English courts could have hardly been lost upon the judges of the Fourth Circuit who have twice concurred, unanimously, in the rule of *Cory v. Burr*. Significantly, Mr. Justice Holmes cited *Cory v. Burr* with approval in *The Llama*, 267 U.S. at 78. This is consistent with the principle espoused in *The John Worthington*, 340 U.S. at 59 (footnotes omitted):

> It is true that we and other American courts have emphasized the desirability of uniformity in decisions here and in England in interpretation and enforcement of marine insurance contracts. Especially is uniformity desirable where, as here, the particular

> form of words employed originated in England. But this does not mean that American courts must follow House of Lords decisions automatically. Actually our practice is no more than to accord respect to established doctrines of English maritime law.

The decision of *Cory v. Burr* continues to be the rule in England. *Wayne Tank and Pump Co., Ltd. v. The Employer's Liability Assurance Corporation, Ltd.*, [1974] 1 Q.B. 57 (1973); *Panamanian Oriental Steamship Corporation v. Wright*, [1970] 2 Lloyd's Rep. 365 (Q.B. Div., Comm. Ct. 1970); *Atlantic Maritime Co., Inc. v. Gibbon* [1954] 1 Q.B. 105 (1953). "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business. . . ." *Queen Insurance Co. of America v. Globe and Rutgers Fire Insurance Co.*, 263 U.S. at 493. This principle has received wide recognition in the circuit courts. *Lenfest v. Coldwell*, 525 F.2d 717, 724 (2d Cir. 1975); *Saskatchewan Government Insurance Office v. Spot Pack*, 242 F.2d 385, 388 (5th Cir. 1957); *Lago Oil & Transport Co. v. United States*, 218 F.2d 631, 634 (2d Cir. 1955) (Op. by Justice Frankfurter); *General Insurance Co. of America v. Link*, 173 F.2d 955, 956 (9th Cir. 1949).

While the petitioners would have this Court conclude that there is a conflict between the case at bar and the precedents forged in this Court, precisely the opposite is true: on the question of proximate cause, in cases where seizure, excluded from coverage, is preceded by barratry, the law is well and harmoniously settled on both sides of the Atlantic.

B. *The Uniform Decisions of the Courts of Appeals Reflect the Consistent Manner in Which the Issue of Proximate Causation Has Been Addressed.*

Certainly the most romantic case cited by petitioners is *Dole v. New England Mutual Marine Insurance Co.*, 7 F. Cas. 837 (C.C.D. Mass. 1864) (No. 3,966). There, the

Golden Rocket was captured (not "confiscated"), boarded and sunk by the crew of the Confederate (not "Union") Steam Ship *Sumter*. The law of the case as to proximate cause was that the loss was occasioned by the capture, and not the subsequent fire. This is consistent with the principle espoused by the district court and court of appeals in this case: if the *Teho* had been sunk by the Colombian Navy, the cause of the loss would have been seizure, not a peril of the sea. The dictum quoted by petitioners is of doubtful relevance in light of this Court's approval of *Cory v. Burr*, itself decided a quarter century after the sinking of the *Golden Rocket*.

Another, even more ancient, case cited by petitioners is *Magoun v. New England Marine Insurance Co.*, 16 F. Cas. 483 (C.C.D. Mass. 1840) (No. 8,961). Therein, a vessel was seized because of alleged smuggling by her master. While under seizure, she rotted to the point that she became a constructive total loss. Because the seizure itself was later found to have been unlawful, the underwriters were declared liable, being unable to avail themselves of the seizure due to illicit trade exception of the policy. Had the seizure by the Republic of New Grenada been lawful, however, the seizure exclusion in the policy would have extinguished the coverage, even though the master's smuggling was, one must assume, barratry. The case is thus firm support for *Cory v. Burr*, although it was apparently not considered by the House of Lords in 1883.

The early Twentieth Century cases from the Second Circuit add little to the discussion. In *Hagemeyer Trading Co. v. St. Paul Fire & Marine Insurance Co.*, 266 F.14 (2d Cir. 1920), *cert. denied*, 253 U.S. 497 (1920), a German vessel rightfully seized by the British caught fire some weeks after her capture. The district court found as a fact that the fire was caused by coal burning in the bunkers — not the seizure. The later scuttling of the ship by her captors to prevent detection was, quite logically, caused by

the fire, not the *preceding* seizure. Just as the *Teho* was not lost or damaged due to the McKays' barratry, the court in *Hagemeyer Trading Co.* did not look to the initial seizure as the loss inducing event. Petitioners did not insure against barratry *per se*, but losses due to barratry; the loss of the *Teho* was the seizure by the Colombian Navy — the equivalent of the bunker fire in *Hagemeyer Trading Co.*

Muller v. Globe & Rutgers Fire Insurance Co., 246 F. 759 (2d Cir. 1917), is identical to *Standard Oil Co. of New Jersey v. United States (The Llama)* and warrants no further examination. Two later Second Circuit decisions do merit discussion, however. *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989 (2d Cir. 1974), follows the reasoning of *Cory v. Burr* closely. There, a Boeing 747 jetliner was hi-jacked over the United Kingdom and destroyed on the ground in Jordan. The "all-risks" insurer claimed that the proximate cause of the loss (hi-jacking) was not covered because of the war risk exclusion. This attempt to connect the loss with the general unrest in the Middle East was rejected by the Second Circuit:

> The all risk policies exclude "loss or damage due to or resulting from" the various enumerated perils, a phrase that clearly refers to the proximate cause of the loss. Remote causes of causes are not relevant to the characterization of an insurance loss. In the context of this commercial litigation, the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to their metaphysical beginnings. The words "due to or resulting from" limit the inquiry to the facts immediately surrounding the loss.

Id. at 1006. Citation for the quote includes *The John Worthington*, 340 U.S. 54, and *Queen Insurance Co. v. Globe & Rutgers Fire Insurance Co.*, 263 U.S. 487.

Also indicative of the unanimity among the circuits is *Crist v. War Shipping Administration*, 163 F.2d 145 (3d Cir. 1947). Therein, the *SS Maiden Creek* was scuttled in an area frequented by German submarines. In concluding that the war risk insurer was not liable, the court relied upon the 'settled rule of construction" cited above in *Queen Insurance Co. v. Globe & Rutgers Insurance Co.*, 263 U.S. 487. The Third Circuit cited several English cases, including *Britain Steamship Co. v. The King*, [1921] 1 A.C. 99 (House of Lords), and *Leyland Shipping Co., Ltd. v. Norwich Union, Ltd.*, [1917] 1 K.B. 873 (Court of Appeal) as further authority for the proposition that marine insurance has a common heritage. Significantly, cases cited by petitioners herein as inconsistent[1] were found to be in harmony with the proximate cause analysis of the district and circuit courts in this case.

Blaine Richards & Co. v. Marine Indemnity Insurance Co., 635 F.2d 1051 (2d Cir. 1980), is equally consistent with the conclusion reached by the Fourth Circuit herein. Citing *Pan American*, the *Blaine Richards* court held:

> This approach has led us, in cases of marine insurance, to apply rather strictly the doctrine of *causa proxima non remota spectatur* ("the immediate not the remote cause is considered"), and hence we have not attempted to trace the origin of losses back to their remote causes.
>
> * * * * * *
>
> In cases involving detention, courts have generally not followed losses back to prior events.

635 F.2d 1054, 1055.

Petitioners' reliance on *Goodman v. Fireman's Fund Insurance Co.*, 600 F.2d 1040 (4th Cir. 1979), is also misplaced. Neither seizure nor barratry was at issue in

[1] *The Llama*, 267 U.S. 76 (1925), and *Muller v. Globe & Rutgers Fire Insurance Co.*, 246 F. 759 (2d Cir. 1917).

Goodman. Also unlike *Goodman*, there was no combination of causes leading to the loss of the *Teho*; petitioners admit that the barratry, in and of itself, did not result in loss of the yacht.

II.

THE DISCREET ISSUE INVOLVED, PROXIMATE CAUSATION WHERE SEIZURE IS PRECEDED BY BARRATRY, IS NOT WORTHY OF CONSIDERATION BY THIS COURT.

From the birth of the Republic there has been a dichotomy in marine insurance. The various perils facing a shipowner have been divided into so-called "marine" risks (sinking, collision, stranding) and "war" risks (piracy, seizure, restraint of princes). Virtually every loss sustainable by a shipowner is included in one type of cover or the other. In the present case, the petitioners failed to insure for war risks. The district court, citing direct, uncontradicted precedent, held that the loss here was due to seizure, not included in the marine risk (denominated "all-risk") policy issued by respondent, Edinburgh. Seizure was specifically excluded; barratry, although nowhere specified, was included. While the metaphysical questions of causation may themselves be intriguing, it is precisely this ambiguity which renders the rule of *Cory v. Burr*, *Republic of China* and the present lower court decisions so valuable. There is not now, never has been, nor need there be ever any doubt as to the dividing line between war risk and marine risk insurance in any case where seizure is preceded by barratry.

The dispute at issue is purely commercial; in its essence it is the interpretation of a contract of insurance whose language is ancient. There is no unresolved legal question of interest to the public. Rather, the decisions below and those cited by respondent herein merely confirm to the world of marine insurance that, in a relatively obscure area of an arcane topic, the boundary lines remain unchanged.

Respondent's view of the importance of the issue coincides with that of the court of appeals. The opinion affirming the district court was not published, in accordance with Rule 18(a) of the United States Court of Appeals for the Fourth Circuit.[2] Respondent urges this Court to agree with the Fourth Circuit that none of the indices of importance has been satisfied.

Respondent closes with a note about the curious and undated letter found at page 1d of petitioners' Appendix D. First, if the government has, in the past, failed to require war risk as well as marine or all risk coverage, its management of the vessel financing program is inexplicably ignorant, if not negligent. Furthermore, if the matter were as important as Mr. Grable suggests, a brief by the government as *amicus curiae*, either in this Court or the Fourth Circuit, would have been appropriate.

CONCLUSION

The decision of the district court and the Fourth Circuit that the seizure of the Yacht *Teho*, following barratrous acts by her crew, which, in themselves, did not produce any loss, was not covered by an insurance policy expressly excluding seizure from coverage, was entirely correct and consistent with a well-established rule of this Court long

[2] 18. Publication of Opinions.

(a) Criteria for publication. An opinion shall not be published unless it meets one of the following standards for publication:

(i) It establishes, alters, modifies, clarifies, or explains a rule of law within this circuit; or

(ii) It involves a legal issue of continuing public interest; or

(iii) It criticizes existing law; or

(iv) It contains an historical review of a legal rule that is not duplicative; or

(v) It resolves a conflict between panels of this court, or creates a conflict with a decision in another circuit; or

(vi) It is in a case in which there is a published opinion below.

in use by the courts of appeals and the courts of England. The rule is chiefly of commercial importance between war risk and marine risk underwriters. Petitioners had only to read their own risk marine policy to discover there was no coverage for governmental seizure. War risk insurance, readily available in the insurance market, would have fully protected petitioners against the loss suffered by them. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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